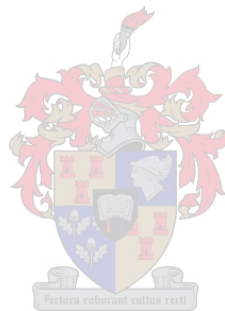


THE IMPACT OF THE QUINTILE FUNDING SYSTEM IN REDUCING APARTHEID- INHERITED INEQUALITIES IN EDUCATION

**Thesis presented in fulfilment of the requirements for the degree of Master of
Laws at Stellenbosch University**



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Declaration

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Summary

The apartheid government created a separate and unequal system of schooling for learners based on racist and discriminatory laws. The education system during the apartheid era was characterised by the gross inequality in the funding of education for different races, the segregated curricula and standards of education, and limited access for Black learners to tertiary education. This meant that there was an unequal distribution of educational opportunities for learners from different races. This study particularly focusses on the funding inequalities in education for Black and White learners during the apartheid era.

During the South African transition to democracy, education became an integral part of the transformation of society along egalitarian lines. In this light, the South African government implemented various laws and policies to regulate the funding of basic education in public schools. One of these policies, and the focus of this study, is the quintile funding system. The quintile funding system attempts to redress the past inequalities in the funding of Black and White schools.

This thesis investigates the impact of the quintile funding system on reducing apartheid-inherited inequalities in the education system in South Africa. This study will unpack the inequalities in education that was created by the apartheid government as this forms the basis for the arguments that will be presented by this study. For this study to determine the impact of the quintile funding system, it is necessary to explore the current basic education system in South Africa. This will be done by analysing the right to a basic education as guaranteed by section 29(1)(a) of the Constitution of the Republic of South Africa, 1996. Furthermore, this study will unpack the quintile funding system and analyse the impact of this system on reducing apartheid-inherited inequalities in the education system. This study will determine the impact of the quintile funding system by determining whether the South African government is in compliance with its constitutional and international obligation to provide all learners with economic access to basic education in public schools. It is argued that the quintile funding system has had a major impact on reducing apartheid-inherited inequalities by providing learners with economic access to basic education in public schools, but that the quintile funding system cannot on its own, achieve the aim of establishing an equal level of education across the country.

Opsomming

Die apartheidsregering het 'n aparte en ongelyke skoolstelsel vir leerders geskep wat gebaseer was op rassistiese en diskriminerende wette. Gedurende die apartheidsera was die skoolstelsel gekenmerk deur die growwe ongelykheid in die finansiering van onderwys vir die verskillende rasgroepe, die gesegregeerde leerplanne en standaarde van onderwys, en die beperkte toegang van Swart leerders tot tersiêre opleiding. Dit het beteken dat daar 'n ongelyke verspreiding van opvoedkundige geleenthede was vir leerders van verskillende rasse. Hierdie studie fokus op die finansieringsongelykhede in onderwys vir Swart en Wit leerders tydens die apartheidsera.

Tydens die Suid-Afrikaanse oorgang na demokrasie het onderwys 'n onontbeerlike hulpmiddel geword om mense te bemagtig. Sodoende het onderwys 'n integrale deel van die transformasieproses geword. In lig hiervan het die Suid-Afrikaanse regering verskillende wette en beleide geïmplementeer om die befondsing van basiese onderwys in publieke skole te reguleer. Een van die beleide, en die fokus van hierdie studie, is die kwintielfinansieringsstelsel. Hierdie finansieringsstelsel poog om die ongelykhede van die verlede in die onderwysstelsel reg te stel.

Hierdie tesis ondersoek die impak van die kwintielfinansieringsstelsel op die vermindering van die oorerflike ongelykhede in die onderwysstelsel van die apartheidsera in Suid-Afrika. Hierdie studie sal die ongelykhede in die onderwysstelsel tydens die apartheid era uiteensit aangesien dit die basis vorm van die argumente wat deur hierdie studie aangebied word. Vir hierdie studie om die impak van die kwintielfinansieringsstelsel te bepaal, is dit van belang om die huidige basiese onderwysstelsel in Suid-Afrika te ondersoek. Dit sal gedoen word by wyse van die ontleding van die reg op basiese onderwys wat deur artikel 29(1)(a) van die Grondwet van die Republiek van Suid-Afrika, 1996 gewaarborg word. Die kwintielfinansieringsstelsel sal ook duidelik uiteengesit word, en die impak van hierdie stelsel op die vermindering van die onderlykhede in die onderwysstelsel, wat deur apartheid geërf is, sal ontleed word. Hierdie studie sal die impak van die kwintielfinansieringsstelsel bepaal deur vas te stel of die Suid-Afrikaanse regering sy grontwetlike en internasionale verpligtinge nakom om alle leerders ekonomiese toegang te gee tot basiese onderwys in publieke skole. Daar sal geargumenteer word dat die kwintielfinansieringsstelsel 'n groot invloed gehad het op die vermindering van ongelykhede wat deur apartheid geërf was deur om te verseker dat alle leerders

ekonomiese toegang tot basiese onderwys het in publieke skole, maar dat die regstelling van hierdie ongelykhede nie net op die kwintielfinansieringsstelsel rus nie.

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Chapter 1: Introduction

1 Research problem

1.1 Introduction

Education can be seen as an objective component of development as well as fundamental to the development of human capabilities.¹ Human beings are to educate and to be educated. As Nelson Mandela once said, “education is the most powerful weapon which you can use to change the world.”² In this light, education is a mighty tool³ that every learner must receive as it involves all experiences that an individual requires to improve their quality of life. “Education furnishes people with dignity, self-respect and self-assurance,”⁴ as it enables people to move away from inherent fears, lack of knowledge and incorrect notions.⁵ It has the fundamental power to improve not only the learner’s life but also the life of the community surrounding the learner. With this said, education facilitates a learner’s learning, knowledge, and skillset, thereby empowering the learner to make comprehensive, educated and well thought-through decisions. These skills enable learners to further their productivity and contribute to establishing a more egalitarian society. Thus, education has become indispensable and invaluable in a quest to eradicate poverty and to tackle socio-economic challenges. Education is of such importance that it has been recognised in section 29 of the Constitution of the Republic of South Africa, 1996 (“Constitution”). This study will focus on the right to a basic education guaranteed in section 29(1)(a) of the Constitution.⁶

Even though the value attached to education is indispensable as illustrated above, education was both unequal and separate during the apartheid era in South Africa.⁷ The apartheid system created an unequal distribution of educational opportunities for

¹ Power C “Education development: Importance, challenges and solutions” (2014) 28 *The Student Economic Review* 149-157 at 149.

² Nelson Mandela speech, Madison Park High School, Boston, 23 June 1990.

³ *Centre for Child Law v Minister of Basic Education* 2020 1 All SA 711 (ECG) para 3.

⁴ Chürr C *A child’s right to a basic education: A comparative study* doctoral thesis, University of South Africa (2005) 125. See also Chürr C “Realisation of a child’s right to basic education in the South African school system: Some lessons from Germany” (2015) 18 *PELJ* 2404-2455 at 2406.

⁵ Chürr (2015) *PELJ* 2406.

⁶ Section 29(1)(a) of the Constitution states that “everyone has a right to a basic education.”

⁷ *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 121.

learners from different races in South Africa.⁸ The apartheid government introduced a specialised form of education for Black people as Black people were required to develop separately from White people.⁹ Black people received an inferior level of education that was limited to the ability to read and write in some instances.¹⁰ The apartheid government created vast amounts of inequalities in the education system that will be considered in this study. This study will particularly focus on the funding inequalities in education in Black and White schools before and during the apartheid era. When the democratic government came to power in 1994, education was recognised as one of the most important tools to empower people. In this light, education became an integral part of the transformation process that South Africa has undergone. The State has implemented various laws and policies to regulate the funding of basic education in public schools. One of these policies implemented by the State is the quintile funding system established in terms of the National Norms and Standard for School Funding policy (“NNSSF policy”), as amended.¹¹ The quintile funding system attempts to redress the past funding inequalities in the education system of South Africa. This study considers the impact of the quintile funding system in reducing apartheid-inherited inequalities in the education system of South Africa.

1 2 Historical account of basic education in South Africa

1 2 1 *The apartheid era*

The apartheid ideology was formally introduced by the National Party (“NP”) in 1948. Apartheid can be defined as racial segregation or separate development, under which different races were encouraged to develop separate societies according to their own traditions.¹² This meant that the provision of education was also racially segregated.¹³ Consequently, different departments of education were established for each racial and

⁸ See section 3 in Chapter 2. See further Simbo C “Defining the term basic education in the South African Constitution: An international law approach” (2012) 16 *LDD* 162-184 at 167-170; Carrim NH *Human rights and the construction of identities in South African education* doctoral thesis, University of Witwatersrand (2007) 178.

⁹ See section 3 3 in Chapter 2. See also Simbo (2012) *LDD* 167-170; Carrim *Human rights* 178.

¹⁰ See section 3 3 in Chapter 2.

¹¹ Department of Education *South African Schools Act, 1996 (Act No 84 of 1996): Amended National Norms and Standard for School Funding* GN 869 in GG 29179 of 31 August 2006 (“*Amended NNSSF*”). When reference is made to the NNSSF policy in this study, it only refers to the *Amended NNSSF* policy gazetted in 2006 unless otherwise stated.

¹² The separate development of races was rooted in the ideologies of White superiority and White dominance in society during the apartheid era. See Carrim *Human rights* 178.

¹³ Carrim *Human rights* 178.

ethnic group namely, Blacks, Indians, Coloureds and Whites.¹⁴ In each instance, the location of such a racially defined public school was in racially defined group areas, and for a racially defined group.¹⁵ This meant that the White schools were in the White areas, providing education for White learners. Black schools were in Black areas, providing education for Black learners, and so forth.

The education system created a sliding scale of education in order to differentiate the level of education received by different races. This meant that the Indian population received a better level of education than the Coloured population, and the Coloured population received a better education than the Black population. The White population received the highest standard of education. This was made possible by the apartheid government as more funding and resources were directed to White schools.¹⁶ This differentiation was regulated by different pieces of legislation enacted to govern the different groupings and the level of education received. This included the Coloured Persons Act 47 of 1963 (“Coloured Persons Act”) and the Indian Education Act 61 of 1965 (“Indian Education Act”).¹⁷ The Black population received the most inferior level of education established through the Bantu Education Act 47 of 1953 (“Bantu Education Act”).¹⁸

Bantu education is defined as an “inferior type of education that was designed to maintain the subordinate and marginal status of the majority of the population.”¹⁹ Bantu education denied Black learners access to the same level of educational opportunities and resources enjoyed by White learners at White schools.²⁰ Moreover, the curriculum for Black learners was written to make it virtually impossible for these learners to pursue further educational opportunities.²¹ Black learners were taught how to read and

¹⁴ *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal, Province of Mpumalanga* 1999 2 BCLR 151 (CC) para 7. See also section 2.2 in Chapter 2.

¹⁵ *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal, Province of Mpumalanga* 1999 2 BCLR 151 (CC) para 7. See also Carrim *Human rights* 178.

¹⁶ *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 121.

¹⁷ Subreenduth S “Why, why are we not allowed even? a de/colonizing narrative of complicity and resistance in post/apartheid South Africa” (2006) 19 *International Journal of Qualitative Studies in Education* 617-638 at 621.

¹⁸ 621.

¹⁹ Thobejane TD *Education in post-apartheid South Africa: Towards liberation or equity?* doctoral thesis, University of Massachusetts Amherst (2005) 2. See also Thobejane TD “History of apartheid education and the problems of reconstruction in South Africa” (2013) 3 *Sociology Study* 2-12 at 2.

²⁰ Langa PN *Exploring school underperformance in the context of rurality: An ethnographic study* doctoral thesis, University of KwaZulu-Natal (2013) 6.

²¹ Spaull N *South Africa's crisis: The quality of education in South Africa 1994-2011* Report for the Johannesburg Centre for Development and Enterprise (2013) 39.

write to enable to them to be employed as servants or labourers.²² This meant that Black learners were directed to unskilled labour as these learners had limited educational opportunities that hampered their upward movement in the social hierarchy.²³

The apartheid government ensured that Black learners remained at the bottom of the classification ladder by funding White schools more favourably than Black schools.²⁴ This meant that during the apartheid era, the expenditure on a White learner was vastly more than the expenditure on a Black learner. At the peak of apartheid, expenditure on a White learner was ten times more than expenditure on a Black learner.²⁵ During 1992, the expenditure on a White learner was four times as much as the expenditure on a Black learner.²⁶ In 1994, the annual per capita expenditure was R5403 for White learners, R4687 for Indian learners, R3691 for Coloured learners and between R1053 and R2184 for Black learners.²⁷ Consequently, Black learners were placed at the bottom of the hierarchy when resource allocations were made to schools. Thus, one of the main characteristics of the education system under apartheid was the gross inequality by which the apartheid government financed education for Black learners.²⁸

1 2 2 The post-apartheid era

1 2 2 1 Introduction

Education has been described as “critical to the transformation of South Africa,”²⁹ as the apartheid regime trapped the majority of the population in poverty.³⁰ The National Development Commission recognised education as its highest priority as it has the ability to enable the eradication of poverty and reducing inequality in South Africa.³¹

²² Badat SM *Black student politics, higher education and apartheid: From SASO to SANSCO, 1968-1990* (1999) 48.

²³ 48.

²⁴ *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 121. See section 4 in Chapter 2.

²⁵ Simbo (2012) *LDD* 168.

²⁶ Liebenberg S & Pillay K (eds) *Socio-economic rights in South Africa: A resource Book* (2000) 348.

²⁷ Department of Education *Report of the committee to review the organisation, governance and funding of schools* (1995) 15.

²⁸ Veriava F “Amended legal framework for school fees and school funding: A boon or a barrier” (2007) 23 *AHRLJ* 180-194 at 181.

²⁹ Arendse L “The school funding system and its discriminatory impact on marginalized learners” (2011) 15 *LDD* 339-360 at 341.

³⁰ National Planning Commission, Department of the Presidency, Republic of South Africa *National Development Plan 2030: Our future – make it work* (2013) 1.

³¹ 24.

This is vital in order to transform society. FW de Klerk stressed the need to transform the education system to be “non-racial yet flexible enough to accommodate the culture and language of every racial group,”³² given the unequal level of education during apartheid.

The Constitution brought in a new era of transformation in the education system based on dignity, equality and freedom.³³ The Constitution has been described as being a transformative document as it seeks to change society for the better, which extends to the basic education system.³⁴ Along with the Constitution, the South African Schools Act 84 of 1996 (“SASA”) and the National Education Policy Act 27 of 1996 (“NEPA”) was introduced to assist transformation in the education system of South Africa. In light of this, the aims of educational transformation were to increase the access and retention of Black learners, achieve equity in public school funding, the elimination of illegal discrimination, the creation of democratic governance, the rehabilitation of schools, and increasing the quality of school performance.³⁵ This thesis will particularly focus on the transformative aim to provide equity in public school funding, that is, to provide all learners with economic access to basic education in public schools.

It can be argued that the State has made strides in providing learners with economic access to basic education in public schools.³⁶ The State has done so by passing legislation and policy documents to enable all learners to access basic education in public schools. In addition to these instruments, the State also developed strategies intended to ensure equitable access to education for all learners.³⁷ Accordingly, the State developed and implemented the quintile funding system.³⁸ One of the main aims

³² “South Africa: Soweto and its aftermath” available at: <http://www.country-data.com/cgi-bin/query/r-12130.html> accessed: 20-08-2020. See also Simbo (2012) *LDD* 171.

³³ Section 1(a) of the Constitution. See further Malherbe R “A fresh start: Education rights in South Africa” (2000) 4 *European Journal for Education Law and Policy* 49-55 at 49.

³⁴ Klare KE “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146–188 at 146. See further McConnachie C, Skelton A & McConnachie C “The Constitution and the right to a basic education” in Veriava F, Thom A & Hodgson TF (eds) *Basic Education Rights Handbook* (2017) 13-35 at 14.

³⁵ Department of Education *White paper on Education and Training in a democratic South Africa: First steps to develop a new system* GN 196 in GG 16312 of 15 March 1995 para 1.

³⁶ Mestry R, du Plessis P & Shonubi OK “State funding in selected African countries: Implications for access to public education” in Shizha E & Makuvaza N (eds) *Re-thinking Postcolonial Education in Sub-Saharan Africa in the 21st century* (2017) 161-181 at 163.

³⁷ Sayed T & Motala S “Getting in and staying there: Exclusion and inclusion in South African schools” (2012) 18 *SARE* 105-118 at 105.

³⁸ The quintile funding system was introduced with the introduction of the NNSSF policy in 1998 to fund schools in accordance with its quintile ranking in an attempt to redress the funding disparities during the apartheid era.

of the quintile funding system is to assist transformation by reducing past funding inequalities rooted in the education system.³⁹ The quintile funding system aims to provide all learners with economic access to public schooling and to not overly burden low socio-economic learners with school fees.⁴⁰

1 2 2 2 The quintile funding system

The quintile funding system is a redistributive strategy of the State's resources whereby public schools are categorised by factors such as the school's social and economic disadvantage, poverty levels and the school's geographical location.⁴¹ Section 34(1) of SASA obligates the State to fund public schools from public revenue on an equitable basis, in order to ensure the redress of past inequalities in the basic education system. Furthermore, the NNSSF policy places a duty on the State to fund schools by distributing funds according to certain categories to progressively target the poorest schools first.⁴² This means that the State gives preferential access to resources to the poorest schools first to adequately fund these schools to enjoy the same level of funding enjoyed by the historically advantaged schools. This is achieved by categorising public schools into categories called quintiles.⁴³ The quintiles are ranked from 1 to 5, that is, the poorest to the least poor school.⁴⁴

Public schools categorised in quintile 1 to 3 are declared no-fee schools which means that the State wholly subsidises these schools.⁴⁵ The school governing bodies ("SGB") of no-fee schools are prohibited from setting any compulsory school fees.⁴⁶ Moreover, the post-apartheid legal framework for school fees and school funding also makes it possible for certain public schools to charge school fees, namely quintile 4 and 5 schools.⁴⁷ These schools are known as fee-charging schools which are partially subsidised by the State.⁴⁸ Section 39 of SASA makes it possible for the SGB of quintile

³⁹ Khumalo N *Some implications of the quintile school funding in South African public schools* master's thesis, University of Stellenbosch (2014) 36.

⁴⁰ Preamble of SASA. See further Branson N, Hofmeyr C & Lam D *The impact of the no-fee school policy on enrolment and school performance: Evidence from NIDS Waves 1-3* (2017) 5.

⁴¹ Khumalo *Some implications* 2.

⁴² *Amended NNSSF* para 109.

⁴³ *Amended NNSSF* para 87. See section 4 3 in Chapter 4 for the factors determining a public school's ranking.

⁴⁴ *Amended NNSSF* para 109.

⁴⁵ Dass S & Rinquest A "School Fees" in Veriava F, Thom A & Hodgson TF (eds) *Basic Education Rights Handbook* (2017) 140-159 at 146.

⁴⁶ *Amended NNSSF* para 43.

⁴⁷ Veriava (2007) *AHRLJ* 180.

⁴⁸ Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* (2017) 146.

4 and 5 schools to determine the amount of school fees charged. The SGB is required to make “appropriate and equitable decisions” regarding the amount of school fees being charged.⁴⁹ The quintile funding system also attempts to equalise the disparity between the low-income and the high-income households by making basic education available and economically accessible to all. The Department of Basic Education (“DBE”) designed this pro-poor model to achieve this objective. Thus, quintile 1 to 3 schools receive more funding from the State compared to the more affluent public schools categorised in quintile 4 and 5.

2 Research question, hypothesis, and methodology

The overarching research question of this study is to determine the impact of the quintile funding system in reducing apartheid-inherited inequalities in the education system of South Africa. This study will unpack the inequalities that was created in the education system during the apartheid era by the apartheid government. Moreover, this study will unpack the right to a basic education as guaranteed by section 29(1)(a) of the Constitution. Thereafter, this study will explore the establishment of the quintile funding system and analyse the impact of the quintile funding system in reducing apartheid-inherited inequalities in the education system of South Africa. In order to determine this impact, this study will explore the State’s obligations towards providing all learners with economic access to a basic education in public schools on a constitutional and international level. It is important to note that the quintile funding system was implemented by the State in an attempt to reduce inequalities in the funding of public schools. During the apartheid era, the differentiation in funding made it possible to create more disparities in Black and White schools. In this light, this thesis will also address the educational inputs in education that play a vital role in learners receiving a quality education in no-fee schools.⁵⁰ These inputs include transport costs, school furniture, infrastructure, and the availability of textbooks.⁵¹ It is important to make the distinction between the quintile funding system and the educational inputs in education. The quality of education learners receive in no-fee schools are to a large extent influenced by the educational inputs in education,⁵² and not by the quintile

⁴⁹ *Amended NNSSF* para 127.

⁵⁰ See section 4 of Chapter 5.

⁵¹ This thesis is limited to the discussion of the educational inputs listed here.

⁵² See section 4 in Chapter 5.

funding system. The quintile funding system attempts to provide all learners with economic access to public schools, and in doing so, attempts to reduce apartheid-inherited inequalities.

In order to address the main research question, it will be vital to address the following research aims. Firstly, this thesis aims to determine the inequalities that was created in the education system during the apartheid era. This will form the basis of this thesis as it focusses on the impact of the quintile funding system in reducing apartheid-inherited inequalities. Moreover, this thesis will explore how Black schools were funded during the apartheid era compared to White schools. This is important as the quintile funding system attempts to specifically reduce funding inequalities in the education system of South Africa. Furthermore, in order for this thesis to determine the impact of the quintile funding system on reducing apartheid-inherited inequalities, it is vital to explore what the right to a basic education entails, especially for the provision of economic access to basic education in public schools. Moreover, it is also important to determine what the State's constitutional and international obligations are in terms of the right to a basic education with emphasis on providing learners with economic access to a basic education in public schools. Furthermore, this study will critically explore the quintile funding system with regard to its aims, objectives and how it functions in public schools. Lastly, to analyse the impact of the quintile funding system in reducing apartheid-inherited inequalities in the education system of South Africa.

The hypothesis underlying this study is that the quintile funding system has indeed made a vital impact on reducing apartheid-inherited inequalities in the education system as learners are able to economically access basic education in public schools. In this regard, it is hypothesised that the State has made strides to reduce the funding disparities in education that was created by the apartheid government.

This thesis will provide an in-depth look at the quintile funding system as it attempts to reduce past inequalities. In order for this to take place, this thesis will provide a legal historical analysis of the education system during the apartheid era before the right to a basic education was enshrined in the Constitution. This will identify the inequalities that was created during the apartheid era by the apartheid government. Moreover, this thesis will aim to interpret the right to a basic education to determine what it entails for economic access to basic education in public schools. This will be done by way of a constitutional, international law and regional international law analysis. Furthermore,

case law will be used to illustrate what the right to a basic education entails and describe the value of a basic education in the South African context. Moreover, the importance of the school fee-exemption policy will be discussed and illustrated using case law. This study will also make use of case law to illustrate how the educational inputs in education play a role in the full realisation of the right to a basic education as vast amounts of inequality still persist due to these inputs. Furthermore, journal articles and academic books will be used to conduct the investigation into the impact of the quintile funding system on reducing past inequalities in the education system of South Africa. Lastly, legislation and educational policies will be used to determine the impact of the quintile funding system in reducing past inequalities in education.

3 Limitations

It is important to make the distinction between the function and the implementation of the quintile funding system in providing learners with economic access to basic education, and the educational inputs in education that seems to work against providing learners with quality education in no-fee schools.⁵³ This thesis is mainly limited to the implementation of the quintile funding system by the State in providing learners with economic access to basic education in order to reduce apartheid-inherited inequalities in the education system of South Africa. This thesis will briefly address the educational inputs in education in the penultimate chapter to further confirm that it does not hinder a learner's economic access to basic education, but it affects the quality of education a learner receives.

4 Outline of chapters

Chapter 2 will provide the history of South Africa, the history of the education system under apartheid, and it will specifically explore the funding of education during the apartheid era and the effect it had on Black learners specifically. As mentioned above, this will form the basis to illustrate the inequalities that was created by the apartheid government.

Chapter 3 will set out the right to a basic education as guaranteed in terms of section 29(1)(a) of the Constitution by considering the constitutional text, international law, and regional international law. This chapter makes an important distinction between

⁵³ See section 4 in chapter 5.

the formal understanding of the right to a basic education and the substantive meaning thereof. This is important as this study will suggest that the State's obligations to provide learners with economic access to basic education is in terms of the formal understanding of the right to a basic education. Moreover, this chapter will explore what the right to a basic education means for economic access to basic education in public schools, and what obligations are imposed on the State to realise economic access for all learners. This is an important finding that this thesis will address as the quintile funding system attempts to provide all learners with economic access to a basic education in public schools and by doing so, attempts reduce funding inequalities in education.

Chapter 4 will explore the quintile funding system. This chapter will explore its aims, how it functions, what type funding is covered for the distribution to schools, and how much funding a school receives for each learner. This chapter is of vital importance as it lays the foundation for this study as this is the policy that the State implemented to provide learners, especially previously disadvantaged learners, with economic access to a basic education, along with the fee-exemptions scheme.

Chapter 5 will analyse the impact of the quintile funding system on reducing apartheid-inherited inequalities in the education system of South Africa. This will be done by looking at whether the State is complying with its constitutional and international obligations to provide learners with economic access to basic education in public schools through the implementation of the quintile funding system. Moreover, this chapter also separates the economic accessibility argument from the educational inputs in education that play a vital role in the quality of education received by learners in no-fee schools.

The last chapter, chapter 6, will provide a summary of all the main findings in each chapter and will provide an answer to the main research question.

Chapter 2: Education in the apartheid era

1 Introduction to apartheid

1.1 Segregation and the Union of South Africa

South Africa became a Union in 1910 when the colonies known as Cape of Good Hope (“Cape”), Natal, the Orange Free State, and the Transvaal merged.¹ From 1910, the government used its dominant authority and the law to sustain racial segregation. This later crystallised into the formal introduction of apartheid in 1948.² Segregation is defined as racial discrimination which “generally legally separated races to the benefit of those of European descent and to the detriment of those from African descent.”³

Racial discrimination can be traced back to the beginning of Dutch colonisation of the Cape in 1652.⁴ The settlers practiced certain forms of discrimination, such as social and economic discrimination. The European settlement expanded as the British government dominated African societies as segregation of White and Black people were favoured amongst the settlers in the Cape. Accordingly, segregation policies attempted to protect White economic and political interest while drawing Africans into the country’s economy as the main source of labour.⁵ For example, one of the first pieces of legislation to regulate the segregation between Black and White people was the Mines and Works Act 12 of 1911. This Act excluded people from African descent from the most skilled categories of work in the mine as it was reserved for people of European descent.⁶ Africans were forced towards the menial and unskilled labour force.⁷ Furthermore, the establishment of the Natives (Urban Areas) Act 21 of 1923 established a uniform policy towards Africans who worked in urban areas. This Act established “locations” where Black people would be accommodated to serve the functional needs of the White population.⁸

¹ Van Wyk D “Introduction to the South African Constitution” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism: The new South African order* (1994) 131-170 at 131.

² Brickhill J & Van Leeve Y “Transformative constitutionalism – guiding light or empty slogan” in Price A & Bishop M (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 141-171 at 144.

³ Clark NL & Worger WH *South Africa: The rise and fall of Apartheid* 2 ed (2011) 18.

⁴ Liebenberg S *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 3.

⁵ 3.

⁶ Clark & Worger *Rise and fall of Apartheid* 22. See also Kaufman SJ *The end of Apartheid: Rethinking South Africa’s peaceful transition*, University of Delaware (2012) 8; Liebenberg *Socio-economic rights* 4.

⁷ Kaufman *The end of Apartheid* 8. See also Liebenberg *Socio-economic rights* 4; Brickhill & Van Leeve “Transformative constitutionalism” in *A transformative justice* 143.

⁸ Clark & Worger *Rise and fall of Apartheid* 23.

1 2 Apartheid

Literally translated from Afrikaans, the word “apartheid” is understood to mean “apartness” or a state of separation. Apartheid was first used as a way of emphasising the importance of Afrikaners,⁹ from Dutch descent, to maintain a cultural identity separate from English-speaking Europeans.¹⁰ In essence it signifies the social and spatial separation of racial groups.¹¹ Apartheid can therefore be defined as separation of races or separate development, under which different races were actively encouraged to develop separate societies according to their own traditions.¹² Not only did the apartheid laws force different groups to live and develop separately but it was also grossly unequal. According to Mokgatle, apartheid can also be described as “total segregation of African people and all non-Europeans in the country, permanent denial of human rights, permanent *baasskaap*, master race, and inferiority for anything non-white.”¹³ Thus, through years of use and different connotations attached to apartheid, it finally became known as the physical separation between Black and White people.

When the NP won the elections in 1948, it formally introduced the apartheid ideology.¹⁴ The NP was committed to the policies of apartheid and White supremacy.¹⁵ The NP described apartheid as:

“a concept historically derived from the experience of the established White population of the country, and in harmony with such Christian principles as justice and equity. It is a policy which sets itself the task of preserving and safeguarding the racial identity of the White population of the country, likewise, preserving and safeguarding the identity of the indigenous people as separate racial groups.”¹⁶

Apartheid was not much different from the previous policy of segregation that existed before the NP came to power. The main difference is that apartheid made segregation official law. The NP acted fast, purposefully and forcefully to enact the policy of racial segregation through legislation.¹⁷ Some scholars and politicians are of

⁹ When reference is made to “Afrikaners” in this study, it refers to the Afrikaans speaking White people during the apartheid era.

¹⁰ Clark & Worger *Rise and fall of Apartheid* 4.

¹¹ Smith DM *Update: Apartheid in South Africa* 3 ed (1990) 4.

¹² Carrim *Human rights* 178.

¹³ Mokgatle N *The autobiography of an unknown South African* (1971) 236. See also Clark & Worger *Rise and fall of Apartheid* 41.

¹⁴ Apartheid formally ended in 1994. See Liebenberg *Socio-economic rights* 2; Clark & Worger *Rise and fall of Apartheid* 3.

¹⁵ Liebenberg *Socio-economic rights* 2. See also Clark & Worger *Rise and fall of Apartheid* 47.

¹⁶ Facing history and ourselves “Early Apartheid” available at: <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 31-05-2020.

¹⁷ Clark & Worger *Rise and fall of Apartheid* 4.

the opinion that apartheid is the extension of an intensified form of segregation.¹⁸ Thus, it signalled the codification of existing racist laws and policies of the government.¹⁹

Every aspect of a South African's life was determined by racist laws. These laws also instituted the legal principles that the White population must be treated more favourable than the Black population.²⁰ Race regulated where learners went to school, what type of education learners received, where people worked, where people died, and whom they could associate with.²¹ The myriad of laws implemented by the NP fit together like a "grand plan" to systematically separate races and to afford White people the most rights and opportunities.²² The next section will look at some of these laws implemented by the apartheid government.

2 Legislation geared towards the NP policy: post 1948

2 1 Introduction

Many of the apartheid laws elaborated on previous colonial policies and segregation legislation.²³ However, apartheid was underpinned by key pieces of legislation. These key pieces of legislation includes the Population and Registration Act 30 of 1950 ("Population Registration Act"), the Group Areas Act 41 of 1950 ("Group Areas Act"), and the Reservation of Separate Amenities Act 40 of 1953 ("Separate Amenities Act").

2 2 Population Registration Act

The Population Registration Act authorised the apartheid government to register all South Africans according to race. This was known as "population groups."²⁴ The government used specific criteria to establish the classification of all South Africans, such as, "physical appearance, general acceptance or how that person was regarded by others."²⁵ Further amendments to the Population Registration Act placed a greater emphasis on appearance in order to classify the population into races.²⁶ The Population Registration Act 64 of 1967, an amendment to the Population Registration

¹⁸ 37.

¹⁹ Teeger C "Both sides of the story: History education in post-Apartheid South Africa" (2015) 80 *American Sociological Review* 1175-1200 at 1179.

²⁰ Clark & Worger *Rise and fall of Apartheid* 48.

²¹ Section 4 of the Group Areas Act. See also Clark & Worger *Rise and fall of Apartheid* 3.

²² Clark & Worger *Rise and fall of Apartheid* 48,49.

²³ 37.

²⁴ Van Wyk "Introduction" in *Rights and constitutionalism* 133.

²⁵ Smith *Update* 2.

²⁶ Population Registration Act 61 of 1962 and Population Registration Act 80 of 1964.

Act, also added descent as a criteria to classify South Africans into races to prevent integration between the different races. Furthermore, this Act also provided a compilation of a population register to issue identity cards indicating the assigned race of an individual.²⁷ The Population Registration Act provided for the classification of South Africans as White, Coloured, or Native (later called “Bantu” or Black or African people).²⁸ Indians were later recognised as the fourth group as this group was separated from the Coloured population.²⁹ Thus, there were four main race groups recognised in South Africa, namely, Blacks, Whites, Coloureds and Indians. Drawing from the principles of Social Darwinism,³⁰ the race groups were ranked hierarchically in term of “supposed intellectual capacity and other attributes.”³¹ The White population was classified at the top as the apartheid government stated that White people should dominate the other race groups due to White people being naturally superior.³² This superiority guaranteed the White population superior access to employment, housing, healthcare, and education.³³

Black South Africans were classified at the bottom of this social hierarchy. The Black population comprised of the indigenous African population, known officially as the “Bantu.” The term “Bantu” was used until the 1970s when this term was abandoned.³⁴ The Black population was the largest group in South Africa.³⁵ The White population comprised of the second largest population group.³⁶ According to Clark and Worger, the Bantu Education Act established a “rigid system of racial classification and identification, which determined an individual’s access to legal rights in South Africa.”³⁷ For example, Black South Africans were deprived of voting rights, and the

²⁷ Clark & Worger *Rise and fall of Apartheid* 49.

²⁸ Clark & Worger *Rise and fall of Apartheid* 49. See further Smith *Update* 2.

²⁹ Clark & Worger *Rise and fall of Apartheid* 49. See further Smith *Update* 2.

³⁰ Social Darwinism is a theory that builds on the idea that Charles Darwin perceived in plants and animals in nature. It states that human groups are subjects to the same laws of natural selection.

³¹ Facing history and ourselves “Early Apartheid” available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 31-05-2020.

³² Facing history and ourselves “Early Apartheid” available at: <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 31-05-2020.

³³ Facing history and ourselves “Early Apartheid” available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 31-05-2020.

³⁴ Smith *Update* 2. The term “Bantu” was used during the apartheid era to refer to the Black population.

³⁵ 2.

³⁶ 2.

³⁷ Clark & Worger *Rise and fall of Apartheid* 49.

right to participate freely in the labour market.³⁸ Thus, the Population Registration Act formed the basis for apartheid and all subsequent apartheid legislation.³⁹

2.3 Group Areas Act

The Group Areas Act laid the fundamental foundation for the establishment of residential separation and physical separation based on race.⁴⁰ This Act included all races and gave government the ultimate power to declare an area fit for occupation by one racial group. The Group Areas Act further gave the government the power to forcefully remove existing occupants of any other race group.⁴¹ Accordingly, the Group Areas Act and the Population Registration Act strengthened separation in urban areas across South Africa. Group Areas were defined for exclusive occupation of a specific race and personal classification determined where any individual or family could legally live.⁴² Consequently, no other member of another racial group were permitted to live, own land or trade in that specific area.

Apartheid operated on three different geographical levels, namely, nationally, within towns and cities, and with respect to the use and access to facilities.⁴³ Nationally, South Africa was divided between the White and Black population. The White population had 87% of the total surface area of South Africa for an estimated 14% of the total population.⁴⁴ The Black population had a significantly lower share in the total surface area of South Africa as they only had 13% of the total area.⁴⁵ The Black population made up for almost 75% of the total population.⁴⁶

The Bantu Authorities Act 68 of 1951 and the Bantu Self-Government Act 46 of 1959 established a basis for ethnic governments in African reserves, known as Homelands. The main idea behind the creation of the Homelands was to set it aside for each major tribal group. These Homelands would eventually become formally

³⁸ Facing history and ourselves "Early Apartheid" available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 31-05-2020.

³⁹ Clark & Worger *Rise and fall of Apartheid* 49.

⁴⁰ Wollheim OD "The suicide of group areas" (1960) 4 *Africa South* 57-62 at 57. See further Clark & Worger *Rise and fall of Apartheid* 51; Smith *Update* 4.

⁴¹ Wollheim (1960) *Africa South* 57. See also Clark & Worger *Rise and fall of Apartheid* 51; Smith *Update* 4.

⁴² The Promotion of Bantu Self-Government Act 46 of 1959 also regulated that the different racial groupings had to live in different areas.

⁴³ Smith *Update* 4.

⁴⁴ 4.

⁴⁵ 4.

⁴⁶ 4.

independent in a political sense, so that the rest of South Africa can be controlled by the White population.⁴⁷ This meant that all political rights, such as the right to vote was restricted to a designated Homeland for the Black population. Subsequently, the Black population would lose citizenship of South Africa but would be citizens in their designated Homeland. Furthermore, the creation of Homelands made it possible for the apartheid government to reverse the flow of Black labour into White areas by forcing Black people to accept citizenship in a “series of small ethnic Homelands.”⁴⁸ Accordingly, this plan for Homeland independence became known as “grand apartheid.”⁴⁹ Grand apartheid became prevalent during the 1960s and 1970s when it was argued that White autonomy should be preserved.⁵⁰ It was a great effort at social engineering that many feared was impossible as it involved comprehensive racial segregation and measures to remove Black people from White areas.⁵¹

2 4 Separate Amenities Act

The Separate Amenities Act allowed differentiated treatment of people according to race.⁵² This Act legalised the racial segregation of public facilities, transport, and services. Section 3(b) of the Separate Amenities Act stated that facilities for different races need not be equal. This provision was strengthened by section 3(a) which permitted the supply of segregated facilities. Furthermore, this provision made it possible for people to be excluded from public facilities, transport and services based on race.

2 5 Concluding remarks

The legislation above makes it clear that the intention of the apartheid government was that racial groups must develop separately. In 1947, a pamphlet for NP for the upcoming elections stated that:

“The party holds that a positive application of apartheid between the white and non-white racial groups and the application of the policy of separation also in the case of non-white racial groups is the only sound basis on which the identity and the survival of each race can be assured and by means of which each race can be stimulated to develop in accordance with its own character, potentialities and calling. Hence, intermarriage between two groups will be prohibited. Within their own areas the non-white communities will be

⁴⁷ 4.

⁴⁸ Kaufman *The end of Apartheid* 8. See further Liebenberg *Socio-economic rights* 2.

⁴⁹ Kaufman *The end of Apartheid* 8.

⁵⁰ Clark & Worger *Rise and fall of Apartheid* 64.

⁵¹ 64.

⁵² 49.

afforded full opportunity to develop, implying the establishment of their own institutions and social services, which will enable progressive non-whites to take an active part in the development of their own people. The policy of our country should envisage total apartheid as the ultimate goal of a natural process of separate development.”⁵³

The quote above and the preceding discussion emphasises that the key pieces of legislation enacted by the apartheid government called for separate development and differential treatment of different groups. For example, The Separate Amenities Act, together with policies and legislation enacted by the apartheid government, also separated schooling based on race. As this section focussed on the effect of the apartheid laws on the South African society, the next section will explore its effect on education.

3 Effect of apartheid on education

3 1 Introduction

Education has been described as fundamental to human existence.⁵⁴ Separating the population based on race, and later geographical location had an immense influence on education. Education laws and policies in South Africa were deeply influenced by the policies implemented by the apartheid government. It has been said that the Population Registration Act laid the foundation for the implementation of apartheid in the education system.⁵⁵ The implication of the Population Registration and the Group Areas Acts was fundamental as learners were only allowed to attend school in areas specifically designated according to race.⁵⁶ Subsequently, the Separate Amenities Act, in conjunction with the Population and Group Areas Acts, enabled the apartheid government to develop and implement differentiated levels of education for the different race groups.⁵⁷ Thus, education also became racialised. The apartheid government sought to draw a clear distinction between the education received by White and Black learners.⁵⁸ Hence, the government specifically designed education for White learners, known as Christian National Education, and Bantu education for Black learners.

⁵³ Facing history and ourselves “Early Apartheid” available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 31-05-2020.

⁵⁴ Dlamini C “Culture, education, and religion” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism: The new South African order* (1994) 573-598 at 574,581.

⁵⁵ Clark & Worger *Rise and fall of Apartheid* 49.

⁵⁶ Carrim *Human rights* 178,179.

⁵⁷ 178.

⁵⁸ Rakometsi MS *The transformation of black school education in South Africa 1950-1994* doctoral thesis, University of Free State (2008) 49.

3.2 Christian National Education

In 1939, the “Instituut vir Christelike-Nasionale Onderwys van die Federasie van Afrikaanse Kulturele Verenigings”⁵⁹ was established.⁶⁰ This was a small but influential group that worked on the formulation of a theory of education which would hold Afrikaners together and would ensure political, social and economic power through indoctrination of its youth.⁶¹ In 1948, the first step towards the realisation of Christian National Education (“CNE”) took place with the publication of the “Christelik-Nasionale Onderwysbeleid” (“*Beleid*”).⁶² CNE was established to formulate educational policies for White Afrikaans South Africans only.⁶³

CNE had two main features. Firstly, all education should be based on the gospel of Christ. The exponents of CNE believed that education was aimed at “the moulding of people in God’s image so that they become fully equipped for every good work,” and at the development of the “Christian and national character” of the nation.⁶⁴ Secondly, that humanity was divided into nations and in doing so, education should also reflect the national differences.⁶⁵ Therefore, CNE reinforced the prohibition on the mixing of cultures, religions and races.⁶⁶ Accordingly, CNE also reinforced the ideology of apartheid that all races must develop separately.

The Christian character of CNE was defined by the *Beleid* as adhering to “the creeds of the three Dutch Reformed Churches”.⁶⁷ MacMillan echoes this as “Christian” is to be defined as being “based on Holy Scripture and expressed in the Articles of Faith of our three Afrikaans scriptures.”⁶⁸ In this light, children must be taught in terms of Christian aims and objects, and the word of God in terms of Scripture. “National” means “imbued with the love of one’s own.”⁶⁹ The main considerations must be “our

⁵⁹ The English translation reads as follows: “Institute for Christian-National Education of the Federation for Afrikaans Cultural Associations.”

⁶⁰ MacMillan RG “Christian National Education” (1967) 28 *Theoria: A Journal of Social and Political Theory* 43-56 at 44.

⁶¹ 44.

⁶² Federasie van Afrikaanse Kulturele Verenigings *Christelike-Nasionale Onderwys Beleid* (1948). See also MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 44.

⁶³ MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 44.

⁶⁴ 44.

⁶⁵ Article 1 of the *Beleid*. See also Van Heyningen C “Christian National Education” (1960) 4 *Africa South* 50-56 at 50.

⁶⁶ MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 45. See also Rakometsi *The transformation of black school education* 31.

⁶⁷ Article 1 of the *Beleid*.

⁶⁸ MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 44.

⁶⁹ Article 1 of the *Beleid*. See also Van Heyningen (1960) *Africa South* 54; MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 44.

country, our language, our history and our culture.”⁷⁰ Thus, the school must be at the heart of national life. The Education character of CNE meant “forming”⁷¹ or “pouring into a set mould.”⁷² Furthermore, the principles of National Education stated that “education in RSA shall have a Christian and broad national character.”⁷³ The Minister explained what was meant by the use of the terms “Christian” and “National” character of education as it was met with some opposition. The Minister stated that:

“My interpretation of the ‘Christian character of education’ is that education shall build on the basis of traditional Western culture and view of life which recognises the validity of the Biblical principles, norms and values... By ‘national’ it is understood that education shall build on the ideal of the national development of all citizens of South Africa, in order that our own identity and way of life shall be preserved, and in order that the South African nation may constantly appreciate its task as part of the Western civilization.”⁷⁴

CNE was therefore based on the idea that “God has allotted to each nation its own soil” and “God has enjoined on each national its individual task in bringing about the fulfilment of His purpose.”⁷⁵ Thus, segregation and apartheid were defended by God’s plan to separate the nations of the world. One theologian argued that segregation would allow “self-determination...to the non-Whites races on every terrain of life.”⁷⁶ White learners were separated from the Black, Indian and Coloured learners.⁷⁷ CNE further stated that neither Coloured nor Black education must develop at the cost of White education.⁷⁸ Coloured and Black education had to include the “Christian” and “National” character of CNE as described above. These learners were taught that their happiness lies in being inferior and separate from the White population.

The National Education Policy Act 39 of 1967 (“Education Policy Act”) controlled the education received by White learners. The Minister of National Education at the time was empowered to determine general policy within a certain legislative framework based on principles. Education was made compulsory for White learners from the start of the year in which a White learner attained the age of 7 years old to the end of the year in which the learner reaches the age of 16.⁷⁹ The policy further stipulated that

⁷⁰ MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 44.

⁷¹ English translation: “Forming.”

⁷² Van Heyningen (1960) *Africa South* 54.

⁷³ Horrell M *Laws affecting race relations in South Africa 1948-1976* (1948) 350. See further Johnson WR “Education: Keystone of Apartheid” (1982) 13 *Anthropology & Education Quarterly* 214-237 at 218.

⁷⁴ Horrell *Laws affecting race relations* 351.

⁷⁵ Article 6 V of the *Beleid*. See also Van Heyningen (1960) *Africa South* 54.

⁷⁶ Kaufman *The end of Apartheid* 15.

⁷⁷ MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 45. See further Rakometsi *Transformation of black school education* 31.

⁷⁸ Rakometsi *Transformation of black school education* 33.

⁷⁹ Horrell *Laws affecting race relations* 353.

education, including textbooks and stationary, will be provided to fulltime White learners in the country. Moreover, education must be tailored to the interest of the learner according to their aptitude and ability.⁸⁰ Subsequently, the centralisation of education for White learners was now complete, and segregation in education was in full effect.⁸¹

3 3 Bantu education

3 3 1 *Establishment of Bantu education*

In 1949, the Nationalist government believed that schooling was an essential tool to achieve success in enforcing apartheid laws.⁸² To keep with the policy of apartheid, a new ideology was introduced in Black schools, called Bantu education.⁸³ The government set up a commission on Native education under the chairmanship of Dr. Eiselen (“Eiselen commission” or “commission”).⁸⁴ The main terms of reference for this commission were:

“the formulation of the principles and aims of education for Natives as an independent race, in which their past and present, their inherent racial qualities, their distinctive characteristics and aptitudes, and their needs under everchanging (sic) social conditions are taken into consideration.”⁸⁵

The commission was further instructed to determine “the extent to which the existing primary [...] education system for Black learners could be modified in the content and form of syllabuses in order to conform to the proposed principles and aims to prepare Black learners for their future occupations.”⁸⁶ Accordingly, the commission later determined that Black people “were too backward to determine their own curriculum.”⁸⁷ In addition to fulfilling this duty, the commission had to take certain factors into account in order to establish this specialised form of education for Black learners. The commission considered factors such as aptitude, distinctive characteristics, and the

⁸⁰ 350.

⁸¹ MacMillan (1967) *Theoria: A Journal of Social and Political Theory* 51.

⁸² Christie P & Collins C “Bantu education: Apartheid ideology or labour reproduction” (1982) 18 *Comparative Education* 59-75 at 59.

⁸³ 59.

⁸⁴ Ndimande BS “From Bantu education to the fight for socially just education” (2013) 46 *Equity, Excellence in Education* 20-35 at 23.

⁸⁵ Christie & Collins (1982) *Comparative Education* 59.

⁸⁶ Johnson (1982) *Anthropology & Education Quarterly* 218.

⁸⁷ Thobejane *Education in post-apartheid South Africa* 3. See also Cross M, Mkwanazi-Twala Z & Klein G *Dealing with diversity in South African education: A debate on the politics of a national curriculum* (1998) 6; Thobejane (2013) *Sociology Study* 2.

inherent racial qualities of Black learners.⁸⁸ Furthermore, certain qualities that Bantu education would seek to promote in Black learners was also considered. These qualities include a sense of duty, punctuality, persistence, sociability, mannerliness, neatness and reliability.⁸⁹ According to Fleisch, these values are attributed to a semi-skilled worker in the industrial society.⁹⁰ Eiselen argued that Bantu education is not racist as it serves as a vehicle through which the majority of Black South Africans would be “civilised.”⁹¹

The Eiselen commission completed its report in 1951. In the main, the report considered that Black education should be an integral part of a carefully and meticulously planned policy of segregated socio-economic development for the Black population.⁹² Furthermore, the commission also emphasised the importance of schooling as a tool for the development and transmission of the “Bantu cultural heritage.”⁹³ Subsequently, the report made three important findings. Firstly, the control and set up of Bantu education must be transferred from the provinces to the State. The control of Bantu education was taken from the religious bodies, as the report was very critical of schools controlled by missionaries.⁹⁴ Here it is important to explain where missionary control came from. When the British took over the Cape, the British saw a need to educate the Black population to take part in church activities. Furthermore, missionary education was also introduced and implemented to assist the spread of the Western way of life among the Black population, in order to teach Black people values.⁹⁵ Thus, missionary education was fundamentally geared towards making the Black population “docile and tame” through the use of Christian

⁸⁸ Rose B & Tunmer R *Documents in South African education* (1975) 244. See also Rakomestsi *Transformation of black school education* 48.

⁸⁹ Commission on Native Education *Report of the Native education commission 1949-1951*, U.G No 53/1951 para 776. See also Fleisch B “State formation and the origins of bantu education” in Kallaway, P (ed) *The history of education under Apartheid* (2011) 39-52 at 41.

⁹⁰ Fleisch “Origins of bantu education” in *History of education under Apartheid* 41.

⁹¹ Thobejane (2013) *Sociology Study* 2.

⁹² Commission on Native Education *Report of the Native education commission 1949-1951*, U.G No 53/1951 para 1051. See also Christie & Collins (1982) *Comparative Education* 59.

⁹³ Leleki MW *A critical response of the English speaking churches to the introduction and implementation of Bantu Education Act in South Africa* doctoral thesis, University of Pretoria (2014) 82. See also Horrell M *Bantu Education in 1968* (1968) 5; Christie & Collins (1982) *Comparative Education* 59.

⁹⁴ Commission on Native Education *Report of the Native education commission 1949-1951*, U.G No 53/1951 para 911.

⁹⁵ Msila V “From Apartheid education to the revisited national curriculum statement: Pedagogy for identity formation and nation building in South Africa” (2007) 16 *Nordic Journal of African Studies* 146-160 at 148.

philosophy.⁹⁶ Missionary schools were nonvocational and academic in nature.⁹⁷ In 1951, the Eiselen commission found that the educational programme for Black people was too academic, and not in line with the socio-economic plan for Black people.⁹⁸ Therefore, the missionary control of schools was abolished as recommended by the Eiselen commission. In effect, this meant that control of the education received by Black learners was taken away from missionaries. It is important to note that missionary education was the main form of education for Black learners before the establishment of the Bantu Education Act.⁹⁹ In this light, the government formed separate schools for Black learners that were centrally controlled by the government, and managed by Black and White authorities. The curriculum in these schools changed to become more vocational in nature.¹⁰⁰ The government's control of schools later became the principal social foundation of apartheid.

Secondly, the report also found that Bantu education should be compulsory. The report stated that the majority of Black learners were either held back or dropped out of school. It established that Black learners began school later, had an additional year in some sub-standards and these learners dropped out of school with on average, four years of schooling left compared to its White counterparts.¹⁰¹ Furthermore, it found that there are factors that supported this trend of Black learners dropping out of school. These factors include overcrowding, lack of learning material and unqualified teachers.¹⁰²

Thirdly, that mother-tongue instruction should be provided for the duration of primary school at least.¹⁰³ The report added that as the "Bantu language broadened, its use as a medium of instruction would increase its importance."¹⁰⁴ The report further held that Black learners must be taught in such a way to find his or her way in the European community. This meant that Black people should be able to follow written or

⁹⁶ 148.

⁹⁷ Collins CB & Gillespie RR "Moving education forward to keep society back: The South African *De Lange* report reevaluated" (1984) 28 *Comparative Education Review* 625-638 at 626.

⁹⁸ Behr AL *Education in South Africa: Origins, issues and trends, 1652-1988* (1988) 34.

⁹⁹ Collins & Gillespie (1984) *Comparative Education Review* 626. See also Du Rand SM *From mission school to bantu education: A history of Adams College* master's thesis, University of Natal (1990) 2.

¹⁰⁰ Collins & Gillespie (1984) *Comparative Education Review* 626.

¹⁰¹ Fleisch "Origins of bantu education" in *History of education under Apartheid* 42.

¹⁰² 41-43.

¹⁰³ Rose BW "Bantu education as a facet of South African policy" (1965) 9 *Comparative Education Review* 208-212 at 211.

¹⁰⁴ 211.

oral instructions, and to carry out simple conversations with the White population about work, and other subjects of common interest.

This commission perpetuated the notions of loyalty to the nationalist government and to advance the White learner at the expense of the majority of Black learners.¹⁰⁵ The report paved the way for the Bantu Education Act 47 of 1953 (“Bantu Education Act”). The Bantu Education Act gave the Minister of Native Affairs, Dr Verwoerd, wide powers to bring effect to main recommendations by the Eiselen commission.¹⁰⁶ The next section will look at the major implications of Bantu education on Black learners.

3 3 2 *The impact of Bantu education on Black learners*

As evident from the discussion above, the Eiselen commission report was instrumental in the creation of Bantu education.¹⁰⁷ The Eiselen commission report stressed that a “planned, centrally controlled schooling system for Blacks should be an important element in the overall development of South Africa.”¹⁰⁸ Subsequently, the principal effect of the Bantu Education Act was that Black education was now under the control of the apartheid government.¹⁰⁹ Subsequently, Black education was directed at Black needs.¹¹⁰ The syllabus was to be adapted to the “Black way of life,” and Black languages was also introduced into Black schools.¹¹¹ Moreover, Black education was centrally financed and controlled under the Native Affairs Minister.¹¹² In doing so, Verwoerd ensured that the Black population remained “hewers of wood and drawers of water.”¹¹³

“The school must equip him [the Bantu pupil] to meet the demands which the economic life of South Africa will impose of him. [...] My department’s policy is that education should stand with both feet in the reserves and have its roots in the spirit and being of Bantu society... The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labour. Within his community, however, all doors are open. For that reason, it is of no avail for him

¹⁰⁵ Thobejane (2013) *Sociology Study* 3.

¹⁰⁶ Christie & Collins (1982) *Comparative Education* 59.

¹⁰⁷ Rose (1965) *Comparative Education Review* 208.

¹⁰⁸ Christie & Collins (1982) *Comparative Education* 66.

¹⁰⁹ 66.

¹¹⁰ 59.

¹¹¹ 59.

¹¹² 59.

¹¹³ In the twentieth century Verwoerd made reference to this quote to explain his belief that apartheid was God’s will. See also Thobejane (2013) *Sociology Study* 2.

to receive a training which has as its aim absorption in the European community, where he cannot be absorbed.”¹¹⁴

The quote above confirms again that the policy of apartheid was exclusively geared towards the establishment of the Afrikaner identity, and geared towards the removal of other groups either culturally or geographically from themselves.¹¹⁵ Black learners were taught the value of their own tribal culture, that such culture is of a lower order, and that in general Black learners “should learn how to prepare themselves for a realistic place” in a White dominate society.¹¹⁶ In terms of skills, Black learners were taught basic communication skills, literacy and numeracy,¹¹⁷ compared to White learners who received a very high standard of education. In light of this, the main characteristics of the education system under apartheid was gross inequality in the funding of education, segregated curricula and standards of education, and limited access for Black learners to tertiary education.¹¹⁸ These characteristics are all of importance and influenced the level of education received by learners from different races.

As mentioned earlier, there were four main racial groups recognised by the apartheid government.¹¹⁹ People of Coloured, Asian, and Indian decent also received an inferior level of education. However, these groups were better off than the education system enacted for Black learners.¹²⁰ To regulate the differentiated level of education received by the different racial groups, the apartheid government introduced a sliding scale of education amongst the different racial groups. The Indian population received a better level of education than the Coloured population, and the Coloured population received a better education than the Black population.¹²¹ The White population received the highest standard of education than any other race. This high standard of education was possible as White schools received more funding and more resources from the apartheid government.¹²² This differentiation was regulated by different

¹¹⁴ Statements of the then – Minister of Native Affairs, and later Prime Minister, Verwoerd which statements. 83 House of Assembly Deb., col. 3575 (1953). See further Clark & Worger *Rise and fall of Apartheid* 55; Berman F “South Africa: A study of Apartheid law and its enforcement” (1991) 2 *Touro Journal of Transnational Law* 1-66 at 28.

¹¹⁵ Christie & Collins (1982) *Comparative Education* 59. See also Leleki *A critical response* 62.

¹¹⁶ Christie & Collins (1982) *Comparative Education* 60. See also Rose (1965) *Comparative Education Review* 208.

¹¹⁷ Christie & Collins (1982) *Comparative Education* 63.

¹¹⁸ Veriava (2007) *AHRLJ* 181.

¹¹⁹ See section 2.2 above.

¹²⁰ Thobejane (2013) *Sociology Study* 2.

¹²¹ 2.

¹²² *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 121.

pieces of legislation enacted to govern the different groupings and the level of education received, such as the Coloured Persons Act 47 of 1963 (“Coloured Persons Act”) and the Indian Education Act 61 of 1965 (“Indian Education Act”). Furthermore, the Bantu Education Act regulated education received by Black learners.

The Bantu Education Act had two main features. Firstly, it brought “an end to missionary control of the education of Black people” and it instituted a mass education system specifically for Black learners.¹²³ This education system was now under the control of the Native Affairs Department,¹²⁴ as previously mentioned. However, when Bantu education was taken away from the missions and churches, Bantu education was placed in the hands of the Black population. Subsequently, Bantu education was managed through committees or other tribal authorities working under the Native Affairs Department.¹²⁵ The apartheid government declared that transferring the control from the missions to the Black population is part of a wider scheme of societal development.¹²⁶ It was designed to assist in the progress of the African people in the form of self-sufficient and responsible communities in all directions.”¹²⁷ Therefore, the Bantu Education Act was of cardinal importance in the concept of races developing separately.¹²⁸

The second feature of the Bantu Education Act was that it legalised a special form of education for Black learners, which differentiated from the education received by White learners.¹²⁹ The focus of the NP’s education policy was how effectively and subordinately Black learners could be managed. Therefore, this education policy was strongly rooted in segregation based on race, religion and cultures that further intensified racial superiority of the White population. The Bantu Education Act was also established to wilfully withhold the majority of the Black population access to education.¹³⁰ With doing so, it denied Black learners’ access to equal educational opportunities and resources which was enjoyed by the White population.¹³¹ The Bantu Education Act engineered a system of inferior education specifically designed for the

¹²³ Behr AL *New perspectives in South African education: A review of education in South Africa, 1652-1984* (1984) 170,171.

¹²⁴ Chürr *A child’s right to a basic education* 108.

¹²⁵ Shepherd RHW “The South African Bantu Education Act” (1955) 54 *African Affairs* 138-142 at 138.
¹²⁶ 138.

¹²⁷ 141.

¹²⁸ Rose (1965) *Comparative Education Review* 208.

¹²⁹ Simbo (2012) *LDD* 168 n 45.

¹³⁰ Badat *Black student politics, higher education and apartheid* 48.

¹³¹ 48.

majority of the Black population.¹³² The Bantu Education Act entrenched the pre-existing inequalities of apartheid into the education system. Accordingly, the Bantu Education Act maintained the subordinate and marginal status of the Black population.¹³³

Christie and Collins argue that apartheid education (also referred to as “Black, African or Bantu education”) was designed to ensure that the White population are schooled in order to take on managerial positions in society whilst Black learners were explicitly schooled to take on menial, unskilled and inferiorised positions in society.¹³⁴ This meant that Black education was directed to unskilled labour, as these learners had limited educational opportunities. Accordingly, Black learners were taught how to read and write to enable them to be employed as servants or labourers in White areas. This hampered their upward movement in the social hierarchy as the curriculum for Bantu education made it impossible for Black learners to pursue further education.¹³⁵ Thus, the enforcement of segregation policies and the Bantu Education Act denied Black learners an equal level of education that would enable these learners to compete with the White population.¹³⁶ Hence, Bantu education fed the Nationalist government’s agenda of racial superiority and the inferiority of the Black population.¹³⁷

Huddleston described the Bantu Education Act as “by far the most important [legislation] and by far the most deadly in its effect.”¹³⁸ The segregated education system was also maintained institutionally as there was a different department of education for each racial group.¹³⁹ White learners were prepared for a life in a dominant society based on the education received in White schools. However, the education received by Black learners in Black schools merely prepared them for a subordinate life.¹⁴⁰ Hence, the education of Black learners was placed at the bottom of the classification ladder.¹⁴¹ The Education Policy Act reiterated that Bantu education

¹³² Badat *Black student politics, higher education and apartheid* 48. See also Thobejane (2013) *Sociology Study 2*.

¹³³ Thobejane (2013) *Sociology Study 2*.

¹³⁴ Thobejane (2013) *Sociology Study 2*. See also Carrim *Human rights* 174.

¹³⁵ Spaull *South Africa’s crisis* 39. See also Badat *Black student politics, higher education and apartheid* 48.

¹³⁶ Thobejane (2013) *Sociology Study 2*.

¹³⁷ Berman (1991) *Touro Journal of Transnational Law* 28.

¹³⁸ Huddleston T *Naught for your comfort* (1956) 158. See also Clark & Worger *Rise and fall of Apartheid* 52.

¹³⁹ Thobejane *Education in post-apartheid South Africa* 3.

¹⁴⁰ Christie & Collins (1982) *Comparative Education* 64.

¹⁴¹ Thobejane (2013) *Sociology Study 2*.

must remain in native areas since the contact between White and Black people endangered the existence of western civilisation and culture. Thus, Bantu education clearly envisaged the separation of White and Black learners in economic and political structures through schooling.¹⁴² Accordingly, Christie and Collins state that the Bantu Education Act prompted “the notion of political, cultural, and economic segregation in broad terms.”¹⁴³

3.3.3 *Resistance to Bantu education*

The Eiselen commission’s recommendations were criticised by 159 different educational organisations and institutions. The criticism challenged the view that Black and White people were inherently different and that these races could never live together peacefully.¹⁴⁴ The critics pointed out that even the most rural areas in South Africa accepted westernisation as their inevitable future.

“Africans seek for integration into the democratic structure and institutions of the country. To them, one of the most effective ways of achieving this is by education – an education essentially in no different from, or inferior to, that of other sections of the community.”¹⁴⁵

Liberation movements sought effective ways to challenge the oppressing system of Bantu education. Between 1950 and 1952, the African National Congress (“ANC”) organised mass actions, which included civil disobediences, boycotts, and protests.¹⁴⁶ It was argued that the struggle for liberation should include a democratic form of education for all. The ANC and the Pan Africanist Congress (“PAC”) were at the forefront of the fight for liberation and a democratic form of education for all in the country.¹⁴⁷ The ANC formulated its proposed education system for a democratic South Africa for the “people” that would take away race and class inequalities. This meant that education should concern itself with the people’s aspirations and needs. The group of “people” referred to were those left marginalised by apartheid. The ANC argued, in its declarations, for the following:

“(1) Education policy shall be geared toward producing a new type of society, dedicated to serve the interests and needs of the South African people as a whole;

¹⁴² Christie & Collins (1982) *Comparative Education* 67.

¹⁴³ 67.

¹⁴⁴ Horrell *Laws affecting race relations* 298.

¹⁴⁵ Matthews ZK & M'Timkulu DGS “The future in light of the Thomlinson report” (1957) 24 *Race Relations Journal* 16-17 at 16.

¹⁴⁶ Facing history and ourselves “Early Apartheid” available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 06-06-2020.

¹⁴⁷ Thobejane (2013) *Sociology Study* 3.

- (2) The educational program shall draw on the most advanced scientific knowledge of the people of South Africa;
- (3) Education shall combat the division between mental and manual training and artificial separation of the arts and sciences;
- (4) Democratic practices shall govern students [...]
- (5) The primary aim of education policy should be to link the education system with broad social goals of democratic society in which there is a political and social justice for all.”¹⁴⁸

The PAC emphasised the following:

“(1) Every individual should be given the opportunity to develop the ability to speak, read and write effectively in any African language and English.”¹⁴⁹

It is clear from the quotes above that non-racism was an ideology that was advocated for by the ANC. In this light, the ANC adopted the Freedom Charter document.¹⁵⁰ The Freedom Charter was a document that included a set of political demands as a result of interviews with 50000 volunteers who spoke of their political hopes for South Africa.¹⁵¹ This document stated that “South Africa belongs to everyone who live in it.”¹⁵² The Freedom Charter called for non-racism and that all people, not just Black people, in South Africa, would share in the country’s wealth and have equal rights.¹⁵³ The aim of the Freedom Charter was to facilitate a smooth transition toward democracy where people would live together in peace and harmony.¹⁵⁴

The PAC also adopted the ideology that emphasised an African outlook within South Africa’s socio-political climate. Student organisations also supported the non-racialism approach, affirming that Bantu education should be abolished.¹⁵⁵ Hence, students also played a vital role in the struggle for a better, and equal system of

¹⁴⁸ Cross et al *Dealing with diversity in South African education* 24. See also Thobejane (2013) *Sociology Study* 5.

¹⁴⁹ Cross et al *Dealing with diversity in South African education* 8. See also Thobejane (2013) *Sociology Study* 6.

¹⁵⁰ Other non-racial organisations also adopted the Freedom Charter. These organisations included the South African Indian Congress, the Coloured People’s Congress, the South African Congress of Trade Unions, and the Congress of the Democrats.

¹⁵¹ Facing history and ourselves “Early Apartheid” available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 06-06-2020.

¹⁵² Thobejane *Education in post-apartheid South Africa* 7.

¹⁵³ Facing history and ourselves “Early Apartheid” available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 06-06-2020.

¹⁵⁴ Thobejane *Education in post-apartheid South Africa* 7.

¹⁵⁵ The student organisations included the South African Student Movement (“SASM”), the South African Student Organisation (“SASO”), Pan Africa Students Organisation, and the Black People’s Convention (“BPC”). Other students’ organisations included the Black Sash, Congress of South African Students (“COSAS”) and the United Democratic Front (“UDF”). All these organisations wanted Bantu education to be abolished even though they had different political views.

education.¹⁵⁶ Dedicated Black learners and parents rose up against the system of apartheid education as they could not accept the inferiority status any longer.¹⁵⁷ These dedicated fighters for liberation boycotted schools in various places such as Cape Town and Soweto. Constant boycotts in these areas became a norm, triggering similar revolts in other parts of the country, such as Limpopo.¹⁵⁸ Resistance to Bantu education spread through the country like wildfire.

Slogans such as “education for liberation,” “away with Bantu education for liberation,” and “away with Afrikaans as medium of instruction” were used to express the opposition to the government’s system of Bantu education.¹⁵⁹ During 1976, the introduction of Afrikaans as the language of instruction in Black schools was heavily opposed and led to a mass protest, known as the Soweto uprising.¹⁶⁰ Even though the introduction of Afrikaans as the medium of instruction is considered as the immediate cause for the Soweto uprising, other factors also contributed to this student uprising. These factors can be drawn back to the introduction of the Bantu Education Act in 1953.¹⁶¹ The uprising of the Black Consciousness Movement (“BCM”) and the South African Student Organisation (“SASO”) raised the political awareness of many students in the fight against unequal education.¹⁶² The liberation fighters sought recognition as “equal partners in the development of South Africa.”¹⁶³ It was argued by these liberation fighters that education must be geared towards the development of the potential of all South Africans irrespective of race or religion. On 16 June 1976, 3000 to 10000 students marched peacefully to protest against the apartheid government’s directives.¹⁶⁴ During the march, the demonstrators were met with a heavily armed police force who fired teargas and live ammunition on the students.¹⁶⁵

¹⁵⁶ Thobejane *Education in post-apartheid South Africa* 5. See also Thobejane (2013) *Sociology Study* 3.

¹⁵⁷ Thobejane (2013) *Sociology Study* 3.

¹⁵⁸ 3.

¹⁵⁹ Thobejane *Education in post-apartheid South Africa* 6. See also Thobejane (2013) *Sociology Study* 3.

¹⁶⁰ Kaufman *The end of Apartheid* 8. See also Simbo (2012) *LDD* 169; Mncwabe MP *Post-Apartheid education: Towards non-racial, unitary, and democratic socialisation in the new South Africa* (1993) 27.

¹⁶¹ See the preceding discussion on Bantu education above.

¹⁶² South African History Online “The June 16 Soweto youth uprising” available at <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 21-10-2020).

¹⁶³ Thobejane *Education in post-apartheid South Africa* 6.

¹⁶⁴ This march was mobilised by SASO and supported by BCM. See South African History Online “The June 16 Soweto youth uprising” available at <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 21-10-2020).

¹⁶⁵ South African History Online “The June 16 Soweto youth uprising” available at <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 21-10-2020).

In turn, this peaceful march erupted into an uprising against the apartheid government. After the Soweto uprising, the apartheid government tried to reform some aspects of the separate and unequal education system, however, many disparities remained well into the 1990s.¹⁶⁶

Education has been described as a “cultural enterprise” and not about technical know-hows or job skills.¹⁶⁷ It is also about the identity of people.¹⁶⁸ However, Bantu education did not live up to this description as it was designed with minimal standards to enable its recipients to fulfil menial jobs. Bantu education never prepared Black learners in areas of technology and science in order to enable these learners to contribute to the proficiency in developing the country.¹⁶⁹ Mr. Maree, Minister in charge of Bantu Education, stated that “the Bantu must be so educated that they do not want to become imitators (of the Whites) but that they will want to remain essentially Bantu.”¹⁷⁰ As a result, Bantu education for Black learners were funded differently.

3 4 Concluding remarks

As it has been said above, the education received by Black learners were basic communication skills, numeracy and literacy as compared to White learners. Furthermore, Black learners were taught just enough to work in White dominated areas as Black education was under the apartheid government’s control. Subsequently, to ensure that Black people are kept at the bottom of the hierarchy, the apartheid government ensured that Black education receive far less funding compared to its White counterparts. The next section will explore the funding disparities between White and Black education before and during the apartheid era.

4 Funding of education

4 1 Introduction

Education was used as a tool to favour White learners as it provided them with a clear advantage to “exclusive access to the rewards of a new and wealthy society.”¹⁷¹ Thus,

¹⁶⁶ South African History Online “The June 16 Soweto youth uprising” available at <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 21-10-2020).

¹⁶⁷ Thobejane *Education in post-apartheid South Africa* 8.

¹⁶⁸ Thobejane (2013) *Sociology Study* 4. See also Thobejane *Education in post-apartheid South Africa* 8.

¹⁶⁹ Thobejane *Education in post-apartheid South Africa* 8,9.

¹⁷⁰ Horrell *Laws affecting race relations* 298. See also Thobejane *Education in post-apartheid South Africa* 9.

¹⁷¹ Johnson (1982) *Anthropology & Education Quarterly* 217.

Black learners were withheld from reaping these rewards as these learners were withheld from receiving the same education as the White population.¹⁷² The government at that time advantaged White schools by directing more resources and funding to it. White schools were consequently vastly better resourced than Black schools. This was also recognised by the Constitutional Court in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* (“Ermelo”).¹⁷³

4.2 The financing of Bantu education

The funding for education for Black learners was grossly inadequate.¹⁷⁴ Before the formal introduction of apartheid, the expenditure on a White learner was R333 whereas expenditure on a Black learner was R1.¹⁷⁵ During 1950 and 1951, expenditure on Black learners rose to R15,16 per pupil, and to R17,99 per pupil in 1953 and 1954.¹⁷⁶ At the peak of apartheid, expenditure on a White learner was ten times more than on a Black learner.¹⁷⁷ In 1960, a White learner received R114,50 per year from the State whereas a Black learner received R13,50.¹⁷⁸ Between 1976 and 1977, expenditure on a White learner was R654 per year whereas expenditure on a Black learner was R48,50.¹⁷⁹ During 1992, the expenditure on a White learner was four times as much as the expenditure on a Black learner.¹⁸⁰ In 1994, the annual per capita expenditure was R5403 for White learners, R4687 for Indian learners, R3691 for Coloured learners and between R1053 and R2184 for Black learners.¹⁸¹ It is clear from the figures above that the education for Black learners was funded vastly different than education for White learners. It can be deduced that the financing of education

¹⁷² 217.

¹⁷³ 2010 2 SA 415 (CC) para 46. The Constitutional Court stated that “White public schools were hugely better resourced than Black schools. They were lavishly treated by the Apartheid government. [...] On the other hand, formerly Black public schools have been scantily resourced as the government deliberately funded these schools stingily.”

¹⁷⁴ Horrell *Laws affecting race relations* 295.

¹⁷⁵ Malherbe EG *Education in South Africa* 2 ed (1977) 572. See also Johnson (1982) *Anthropology & Education Quarterly* 217.

¹⁷⁶ Horrell *Laws affecting race relations* 296.

¹⁷⁷ Simbo (2012) *LDD* 168. See also Behr AL & Macmillan RG *Education in South Africa* (1966) 346; Johnson (1982) *Anthropology & Education Quarterly* 217.

¹⁷⁸ Education Panel *Education and the South African Economy* (1966) 121-123.

¹⁷⁹ Gordon L et al *Survey of Race relations in South Africa* (1979) 399. See also Johnson (1982) *Anthropology & Education Quarterly* 217.

¹⁸⁰ Liebenberg S & Pillay K *Socio-economic rights in South Africa: A resource Book* (2000) 348.

¹⁸¹ Department of Education *Report of the committee to review the organisation, governance and funding of schools* (1995) 15.

for Black learners was grossly unequal compared to the financing of education for White learners.

4.3 Establishment of school funds for Black schools

In 1957, the government set out regulations for school funds within the schools for Black learners.¹⁸² School funds in this area was only applicable if the school board in the area decided to implement it. The revenue of these funds were derived from bazaars and concerts.¹⁸³ In addition, some pupils in higher grades might have been required by the school board to make compulsory contributions, amounting to not more than R1 per pupil per quarter.¹⁸⁴ In primary schools, pupils were requested to make voluntary donations of not more than 10 cents per pupil per quarter.¹⁸⁵ The majority of the funds collected were used by school committees to provide equipment for the school. In addition, the school board would collect up to 10% of the funds raised to offset expenses incurred by the board. Even though these funds were used to provide the school with equipment, a lack of textbooks, desks and chairs was still common in Black schools.¹⁸⁶ These schools did not have libraries, laboratories, or the appropriate infrastructure and facilities for operating on a daily basis. Subsequently, these learners did not see the need to attend school on a regular basis as they endured suffering and anger under apartheid.¹⁸⁷ By contrast, White schools were treated more favourably as more funding and resources were directed to these schools by the apartheid government. White schools had trained teachers, well-equipped classrooms, and sporting facilities.¹⁸⁸ Moreover, White learners received books and stationery free of charge, unlike Black learners.¹⁸⁹

¹⁸² GN 251 of 22 February 1957.

¹⁸³ Horrell *Laws affecting race relations* 306.

¹⁸⁴ 306.

¹⁸⁵ 306.

¹⁸⁶ Liebenberg & Pillay *Socio-economic rights* 348. See also Johnson (1982) *Anthropology & Education Quarterly* 221.

¹⁸⁷ Simbo (2012) *LDD* 167.

¹⁸⁸ *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal, Province of Mpumalanga* 1999 2 BCLR 151 (CC) para 7. See also Simbo (2012) *LDD* 168,169; Nekhutivha F "Transformation education: The Education Crisis and Suggested Solutions" (1987) at 9-12. A paper delivered to the Association for Sociology in Southern Africa in June-July 1987 at the Conference held in the Western Cape.

¹⁸⁹ Johnson (1982) *Anthropology & Education Quarterly* 219.

4.4 Influence of a lack of funding on examination results

Before 1959, some Black learners wrote provincial matriculation examinations while others entered the National Senior Certificate (“NSC”) of the Department of National Education.¹⁹⁰ It was later decided that all Black learners must write the examination of the Joint Matriculation Board (“JMB”). From 1962 onward, Black learners could write either the JMB or the NSC examination. However, the results obtained by these learners were dismal.

In 1953,¹⁹¹ 47.3% of Black learners passed with matriculation exemption. Only 19% of Black learners passed with matriculation exemption in 1960.¹⁹² In 1971, only 35.3% of the Black candidates who wrote passed with matriculation exemption.¹⁹³ In 1975, 41.6% of the Black learners who wrote the examination passed in the Republic.¹⁹⁴ 22.2% of these learners obtained a School Leaving Certificate. Accordingly, the total number of passes for Black learners in 1975 in the Republic was 63.8%.¹⁹⁵

By contrast, between 1962 and 1963, roughly 47% of White learners who wrote the examination gained entrance to university.¹⁹⁶ Furthermore, in 1965, 58.23%,¹⁹⁷ of White learners passed with matriculation exemption or with a school leaving pass. In 1967, 76.4% obtained a matriculation exemption or a school leaving pass.¹⁹⁸ This number increased to 78.6% in 1968.¹⁹⁹ In 1981, 94% of White learners passed the matriculation examinations and 49% received matric exemption.²⁰⁰ The figures above illustrate Black learners did not do as well in the examinations compared to White learners. Here it could be argued that a lack of funding and resources in Black schools had a vital influence on the matric examination results obtained by Black learners compared to White learners. In this light, it is argued that the curriculum received by Black learners in Black schools made it almost impossible for Black learners to go beyond matric or to qualify for admittance to any higher education institution.²⁰¹ Thus,

¹⁹⁰ Horrell *Laws affecting race relations* 320.

¹⁹¹ It is important to note that 1953 was the year in which Black learners were removed from missionary schools and forced into an education system regulated by the Bantu Education Act.

¹⁹² Horrell *Laws affecting race relations* 320.

¹⁹³ 321.

¹⁹⁴ 321.

¹⁹⁵ 321.

¹⁹⁶ Horrell *Laws affecting race relations* 357. 10907 of 23081 White learners who wrote the examination.

¹⁹⁷ A total of 49590 White learners wrote the examination of which roughly 59% passed.

¹⁹⁸ Horrell *Laws affecting race relations* 358. There was a total of 39637 White candidates.

¹⁹⁹ Horrell *Laws affecting race relations* 358. There was a total of 41139 of White candidates.

²⁰⁰ Christie P *The right to learn* (1991) 120. See further Simbo (2012) *LDD* 170.

²⁰¹ Taylor R “The narrow ground: Critical intellectual work on South Africa under Apartheid” (1991) 5 *Critical Arts* 30-48 at 31. See also Simbo (2012) *LDD* 169.

the inadequate level of education received by Black learners did not prepare these learners to break out of their subordinate social and economic position in society.²⁰²

4.5 Concluding remarks

As illustrated by the figures above, White schools were treated more advantageously by the apartheid government. This enabled these schools to invest in enough resources to advantage the learner in order to produce good academic performances,²⁰³ and to seek further education. Black schools were mostly abandoned by the apartheid government as more funding and resources were allocated to White schools. It is evident that less Black learners were able to write examinations as the education received by Black learners was of an inferior design, and that the funding of education for Black learners were placed at the bottom of the educational hierarchy. As a result of a lack of funding in Black schools, there was a minimum number of educated Black learners and communities. In turn, the lack of funding in Black schools made it difficult or nearly impossible for Black learners to pursue further education.²⁰⁴ In effect, this led to poor education and higher dropout rates in Black schools.²⁰⁵ Evidently, these discrepancies created a two-school system differentiating between Black and White learners. It is evident that there are huge differences in the educational achievements by Black and White learners.²⁰⁶ Thus, given the arguments above and the uprising of learners to abandon Bantu education, the government was set to reform the educational system of South Africa to be inclusive for all after the fall of apartheid.

5 Reforming the education system at the end of apartheid

Many South Africans, especially the most vulnerable and marginalised groups, argue that apartheid made a vital and qualitative difference in their lives.²⁰⁷ Seekings and Nattrass observe:

“No other capitalist state (in either the North or South) has sought to structure income inequalities as systematically and brutally as did South Africa under apartheid.”²⁰⁸

²⁰² Chürr *A child's right to a basic education* 107. See also Johnson (1982) *Anthropology & Education Quarterly* 222.

²⁰³ Robertson N & Robertson B *Education in South Africa* (1977) 19-23. See also Simbo (2012) *LDD* 168.

²⁰⁴ Simbo (2012) *LDD* 169.

²⁰⁵ Mncwabe *Post-Apartheid education* 27. See also Khumalo *Some implications* 37.

²⁰⁶ Khumalo *Some implications* 37.

²⁰⁷ Clark & Worger *Rise and fall of Apartheid* 49.

²⁰⁸ Seekings J & Nattrass N *Class, race and inequality in South Africa* (2005) 6. See also Liebenberg *Socio-economic rights* 3.

As negotiations between the ANC and the NP became public knowledge in the early 1990s, South Africans began to dream of a democratic future.²⁰⁹ Leaders of the anti-apartheid struggle sought to create a democratic government that reflected the country's diversity, and to transform a State that was once committed to the notions of White supremacy into a rainbow nation.²¹⁰ However, the apartheid era left South Africa with many deep-rooted legacies. At the end of apartheid, the government had a daunting task to restructure the education system as South Africa was in the process of transitioning into a democratic society.²¹¹ In 1990, liberation movements, such as the ANC and the PAC, were unbanned and it was indicated that political prisoners would be released. Subsequently, the policy of apartheid was abandoned by then president, FW de Klerk. De Klerk stressed the importance of creating a flexible and non-racial education system to preserve the culture and language of every racial group.²¹²

As a reaction to the inequality in the education system, the Institute of Race Relations appointed a Commission to compile a report to address the need for non-discrimination and equal opportunities in the education system.²¹³ This Commission suggested that the government should restructure its budget to allow more financing for education.²¹⁴ Furthermore, the government funded and commissioned the Research Council Review Commission ("Research Council") to review the education system in South Africa. Subsequently, the Research Council appointed the De Lange Commission to report on education. The De Lange report has been described as the "most comprehensive and detailed in both its stated and its implied assertions."²¹⁵ The report fundamentally recognised that the education system in South Africa was in crisis and made recommendations accordingly. The De Lange Commission recommended that education must be desegregated,²¹⁶ as education must be recognised as a

²⁰⁹ Facing history and ourselves "Early Apartheid" available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 29-08-2020.

²¹⁰ Facing history and ourselves "Early Apartheid" available at <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction> accessed on 29-08-2020.

²¹¹ Brickhill & Van Leeve "Transformative constitutionalism" in *A transformative justice* 144.

²¹² "South Africa: Soweto and its aftermath" available at: <http://www.country-data.com/cgi-bin/query/r-12130.html> accessed: 20-08-2020. See also Simbo (2012) *LDD* 171.

²¹³ Mncwabe *Post-Apartheid education* 9-13. See also Simbo (2012) *LDD* 169.

²¹⁴ Simbo (2012) *LDD* 169,170.

²¹⁵ Collins & Gillespie (1984) *Comparative Education Review* 625.

²¹⁶ The De Lange commission did not recommend the desegregation of public schools, only the desegregation of universities and private schools.

fundamental human right.²¹⁷ The De Lange Commission further recommended that every South African had an entitlement to a “rightful share” in education.²¹⁸

The introduction of a constitutional democracy was accompanied by high hopes that poverty and inequality would be reduced by having a legal framework based on social justice, dignity, equality and freedom. One of the most significant changes in South Africa’s legal system was the change from parliamentary sovereignty, which existed under apartheid to constitutional supremacy, which entrenches the Bill of Rights.²¹⁹ The inclusion of socio-economic rights, such as the right to a basic education,²²⁰ in the Constitution must be viewed as fundamental as it facilitated the transition to a democratic South Africa. The new democracy was determined to go far beyond the basic schooling Black learners received during apartheid. Education has been identified as one of the core socio-economic rights under the Constitution as it is essential to a well-functioning democracy.²²¹

6 Conclusion

Education as a socio-economic benefit was regulated via legislation on a racially discriminatory basis.²²² The majority of the Black population was denied equal education based on the ideologies of White supremacy and apartheid. The government created and enforced Bantu education to perpetuate these ideologies. Black learners did not receive the same level of education as compared to the White population. This pure denial of quality education was enabled through the lack of funding and resources received by Black schools. As set out above, Bantu education received far less funding from the government than its White counterparts.²²³ Black learners could not move out of poverty and upward in the social hierarchy in South Africa due to a relative lack of skills and formal training.²²⁴ Thus, funding was a huge issue that also led to the structural inequality of schooling. Thus, the discrepancies in the funding of Black and White schools led to the creation of the two-school system.

²¹⁷ 169,170.

²¹⁸ 170.

²¹⁹ Section 2 of the Constitution states that the Constitution is the supreme law of the Republic. See further Liebenberg *Socio-economic rights* 1.

²²⁰ Section 29 of the Constitution.

²²¹ Rapatsa M “South Africa’s transformative Constitution: From civil and political rights doctrines to socio-economic rights promises” (2015) 5 *Juridical Tribune* 208-219 at 215,216.

²²² See section 2 above.

²²³ See section 4 2 above.

²²⁴ Johnson (1982) *Anthropology & Education Quarterly* 222.

Education has been described as a tool that has the power to transform society to be more just and equal. This chapter serves as the foundation to identify the inequalities in the education system in South Africa during the apartheid era. It especially focusses on the funding inequalities in the education system under the apartheid government as funding is the key to economically access education. The next chapter will focus on the inclusion of education as a socio-economic right in the Constitution, the transformative nature of education within the South African context, the interpretation of a “basic education” in terms of the Constitution, and as informed by international and regional international law, and the State’s constitutional and international obligations to provide learners with economic access to a basic education in public schools.

Chapter 3: The right to a basic education

1 Introduction

Education laws and policies in South Africa were deeply influenced by the policies implemented by the apartheid government during the apartheid era.¹ The previous chapter identified the main inequalities in the education system during the apartheid era. The education system during apartheid was characterised by the gross inequality in the funding of education for different races, the segregated curricula and standards of education, and limited access for Black learners to tertiary education.² These characteristics were vital to the apartheid government as it influenced the level of education received by learners from different races.³ Thus, the democratic government had a huge task to address the fundamental inequalities that was created by the apartheid government in the education system. This thesis focusses on the impact of the quintile funding system on reducing apartheid-inherited inequalities, particularly funding inequalities, in the education system of South Africa. Therefore, it is vital to explore the education system under the constitutional dispensation. In this light, this thesis will focus on the right to a basic education and what it entails for all learners. The right to a basic education has been described as “one of the simplest and most powerful rights”⁴ entrenched in the Constitution.

This chapter has three main aims. Firstly, this chapter will explore the transformative role of the Constitution, and the transformative role of education in the South African context. This is of cardinal importance as the quintile funding system attempts to redress past inequalities, and thereby assist transformation in the education system. Secondly, this chapter directs its aim to interpret the right to a basic education. This includes establishing the nature of the right to a basic education, as it is distinguishable from other socio-economic rights guaranteed in the Bill of Rights. Moreover, this section will establish the formal and substantive understanding of the right to a basic education as this thesis builds its foundation on the formal understanding of a basic education. Thereafter, this section investigates the interpretation of the right to a basic

¹ See section 2 in Chapter 2.

² See section 4.4 in Chapter 2. See further Veriava (2007) *AHRLJ* 181.

³ See section 3.2 & 3.3 in Chapter 2.

⁴ Paterson K “Constitutional adjudication on the right to basic education: Are we asking the state to do the impossible” (2018) 34 *SAJHR* 112-121 at 112.

education. This will be done by examining the constitutional text, international law, and regional international law relating to the right. Thirdly, this chapter will investigate the constitutional and international obligations imposed on the State to realise the right to a basic education with emphasis on the State providing economic access to basic education in public schools. This section of this chapter is of great importance as it sets the basis for analysing whether the quintile funding system has made an impact on reducing apartheid-inherited inequalities in the education system of South Africa.

2 Education and transformation

2.1 Inclusion of socio-economic rights in the 1996 Constitution

South Africa's transition to democracy necessitated the complete redesign of apartheid education.⁵ The Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution") served as a transitional document to full democracy as the Interim Constitution did away with parliamentary sovereignty, a dominant executive, and a system based exclusively on racism. It introduced the protection of fundamental rights in a supreme Constitution in order to build a more equal society.⁶ Chapter 3 of the Interim Constitution made provision for a small but significant group of socio-economic rights, such as section 32 which provided for the right to a basic education. The Interim Constitution laid a vital foundation for the inclusion of an expansive set of educational and other socio-economic rights in the Constitution.⁷ However, during the drafting of the Interim Constitution and the Final Constitution, there was fierce debate as to the inclusion of socio-economic rights.⁸ Various political leaders and figures argued for the inclusion of socio-economic rights.

Dullah Omar, a member of the ANC's Constitutional Committee, argued for the inclusion of socio-economic rights in the Bill of Rights as it would assist transformation in society. Omar further argued that the exclusion of socio-economic rights would nullify equality and democracy for the majority of the population.⁹ Omar identified certain objectives that a Final Constitution must promote. These objectives includes that the Constitution "should not prevent social and economic transformation, and the

⁵ Veriava F *Realising the right to basic education: The role of courts and civil society* (2019) 3.

⁶ Van Wyk "Introduction" in *Rights and constitutionalism* 132.

⁷ For example, section 29 of the Constitution which provides for educational rights.

⁸ For further information about the debate, see Heyns C & Brand D "Introduction to socio-economic rights in the South African Constitution" (1998) 9 *LDD* 153-167 at 154-156.

⁹ Omar D "Enforcement of social and economic rights" in *A bill of rights for a democratic South Africa* (1991) 106-114 at 112.

achievement of social and economic rights.”¹⁰ Furthermore, it must create certain mechanisms and measures in order to empower the people of South Africa to achieve and defend their fundamental rights.¹¹

Albie Sachs also argued for the inclusion of socio-economic rights in the Bill of Rights. Sachs argued that the inclusion would make the transition to democracy meaningful for all. Furthermore, the transition would fundamentally improve the quality of life for all, and promote the enjoyment of all rights.¹² Nelson Mandela also argued for the inclusion of socio-economic rights in the Bill of Rights as he stated that “we must provide for all the fundamental rights and freedoms associated with a democratic society.”¹³ Therefore, the rationale for the inclusion of socio-economic rights, as argued by these individuals, is twofold. Firstly, it promoted a substantive notion of human rights that was a direct response to all forms of injustice and subordination during the apartheid era.¹⁴ Secondly, the ANC envisaged a process of transformation that will empower the people of the country.¹⁵ The ANC clearly indicated a need to redress the socio-economic legacy left by apartheid to assist the most vulnerable members of society, and to transform a very unequal society into an egalitarian society.

2.2 Transformative nature of the 1996 Constitution

The Constitution is the “political and legal foundation for the democratic transformation of South Africa.”¹⁶ The Constitution has been described as an extraordinary text which represents the epitome of progressive democracy.¹⁷ It provides a legal framework to redress past injustices as well as to facilitate the development of a more just and equal society in the future. Hence, the Constitution has been described as both backward-

¹⁰ Omar “Enforcement of social and economic rights” in *A bill of rights* 112. See further Liebenberg *Socio-economic rights* 9.

¹¹ Omar “Enforcement of social and economic rights” in *A bill of rights* 112.

¹² Sachs A “Towards a Bill of Rights in a democratic South Africa” (1990) 6 *SAJHR* 1-24 at 4-6. See further Liebenberg *Socio-economic rights* 8.

¹³ Mandela NR “Address: On the occasion of the ANC’s Bill of Rights conference” in *A Bill of Rights for a democratic South Africa: Papers and report of a conference convened by ANC Constitutional Committee, May 1991* (1991) 9-14 at 12.

¹⁴ Omar “Enforcement of social and economic rights” in *A bill of rights* 106, 112.

¹⁵ 112.

¹⁶ Arendse L “The South African Constitution’s promise of ‘radical transformation:’ Unequal access to quality education for black and/or poor learners in the public basic education system” (2019) 23 *LDD* 100-147 at 102. See also Albertyn C & Goldblatt B “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” (1998) 14 *SAJHR* 248-276 at 248.

¹⁷ Rapatsa (2015) *Juridical Tribune* 208.

and forward-looking.¹⁸ The backward-looking aspect of the Constitution aims to facilitate the transformation of society as it strives to correct the wrongdoings of the past.¹⁹ The forward-looking aspect of the Constitution facilitates the “construction of a new political, social and economic order based on democratic values, social justice and fundamental human rights.”²⁰

The preamble specifically states that the “Constitution is the supreme law of the land adopted to heal the divisions of the past, to establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens and free the potential of people.”²¹ Thus, the Constitution requires constant evaluation to honour those affected by past injustices and strive for the achievement of equality and advancement particularly to previous disadvantages communities.²²

The Constitution contains the Bill of Rights that protects and preserves entrenched privileges, and extends the enjoyment of rights to everyone.²³ Thus, the Bill of Rights is a transformative tool aimed at redressing past social and economic injustices.²⁴ The Constitutional Court in *Soobramoney v Minister of Health, Kwazulu-Natal* (“*Soobramoney*”),²⁵ and *Government of RSA v Grootboom* (“*Grootboom*”)²⁶ acknowledged the transformative nature of the Bill of Rights.²⁷ In *Soobramoney* the following statement was made:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment,

¹⁸ Teitel R *Transitional justice* (2000) 191. See also Teitel R “Transitional jurisprudence: The role of law in political transformation” (1997) 106 *Yale LJ* 2009-2080 at 2014.

¹⁹ Liebenberg *Socio-economic rights* 25.

²⁰ Preamble of the Constitution. See also Liebenberg *Socio-economic rights* 27; Arendse (2019) *LDD* 102.

²¹ Preamble of the Constitution. See further Moseneke D “The fourth Bram Fischer memorial lecture: Transformative adjudication” (2002) 18 *SAJHR* 309-319 at 313.

²² Brickhill & Van Leeve “Transformative constitutionalism” in *A transformative justice* 155. See also Rapatsa (2015) *Juridical Tribune* 209.

²³ De Vos P “*Grootboom*, the right of access to housing and substantive equality as contextual fairness” (2001) 17 *SAJHR* 258-276 at 261.

²⁴ De Vos (2001) *SAJHR* 259. See also Pieterse A “The transformative nature of the right to education” (2004) 4 *TSAR* 700-714 at 709; Brand D “The South African Constitutional Court and livelihood rights” in Vilhena O, Baxi U & Viljoen F (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 414–441 at 414; Arendse (2019) *LDD* 102.

²⁵ 1997 12 BCLR 1696 (CC).

²⁶ 2000 11 BCLR 1169 (CC).

²⁷ The notion of the Constitution as a transformative document has also been confirmed by other Constitutional Court judgements. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 73 & 74; *Minister of Finance v van Heerden* 2004 6 SA 121 (CC) at para 142; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 77; *Governing Body of the Juma Musjid Primary School v Essa* NO 2011 8 BCLR 761 (CC) para 38.

inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”²⁸

This passage creates a link between socio-economic rights and the constitutional values of equality, dignity and freedom. It obliges the State to address conditions of inequality and poverty, and to transform our society based on these values.²⁹ In *Grootboom*, the Constitutional Court acknowledged the vast social and economic injustices in society, which left “many people vulnerable, and far removed from the ideal of a life lived in dignity and respect.”³⁰ It can be argued that people cannot reach their full potential as individuals when structural inequalities exist and where the State fails to address these inequalities.³¹ The transformative nature of the Bill of Rights requires the State to address basic social and economic needs.³² The transformative role of the Constitution can be described as follows:

“Given South Africa’s history of deprivation and prejudice; given the deep structural social and economic inequalities that exists in our society; given the Constitution’s respect for individuality, difference, and hence the human dignity of all; given the constitutional goal of achieving a totally transformed society; how should the State or other relevant actors act or refrain from acting to ensure that there will be no unfair impact on the affected group? We look at the actual impact of the action or inaction by the State or other relevant actors and ask whether that can be sanctioned given our long-term commitment to a complete transformation of society in a manner that is contextually fair.”³³

The Constitution, more specifically the Bill of Rights, is geared towards transforming society to address the legacy of apartheid through its transformative role. Many rights have been entrenched in the Bill of Rights to reach the transformative aims discussed above. However, one of the most important rights to fulfil these aims, is the right to a basic education. The next section will discuss the transformative role of the right to a basic education as entrenched in section 29(1)(a) of the Constitution.

2 3 Transformative role of the right to a basic education

Given that the transformation of society is the central theme of the Constitution, it is necessary to explore the content of the right to a basic education in order to confirm

²⁸ *Soobramoney* para 6.

²⁹ Liebenberg S “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” (2002) 6 *LDD* 159-192 at 164.

³⁰ De Vos (2001) *SAJHR* 268.

³¹ Pieterse (2004) *TSAR* 703.

³² De Vos (2001) *SAJHR* 268. See also Pieterse (2004) *TSAR* 703.

³³ De Vos (2001) *SAJHR* 275.

the Constitution's transformative objective of the right to a basic education. The right to a basic education was included in the Bill of Rights to assist the underprivileged people in society, and to protect their fundamental needs and interest.

The right to a basic education is viewed as the "primary vehicle by which economically and socially marginalise adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."³⁴ In this sense, the right to a basic education is an empowerment right as it enables a person to enjoy the benefits of other rights as well.³⁵ Other civil and political rights such as the right to the right to freedom of association, freedom of expression, and the right to political participation has value when a person is educated.³⁶ Education advances freedom since an educated person has elevated social mobility. This means that an educated person has a higher chance of escaping the poverty cycle and certain forms of discrimination, and thereby they have the increased capacity to safeguard their freedom.³⁷ Walsh states that "education is so vital to human life that was conceived as a pre-existing or natural right to the positive law."³⁸ Therefore, educational reform is a vital part of constitutional transformation as transforming the school system to be democratic and non-discriminatory is essential for the inclusion of all learners.³⁹

The transformative nature of education is expressly stipulated in the preamble of the South African Schools Act 84 of 1996 ("SASA"), which seeks to give effect to the right to a basic education.

"Whereas the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and

Whereas this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all

³⁴ Paterson (2018) *SAJHR* 115.

³⁵ Coomans F "In search of the core content of the right to education" in Brand D & Russell S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 167-174 at 160. See also Veriava F "Realising the right to basic education in South Africa" in *Socio-economic rights: Progressive realisation?* (2016) 81-154 at 81; *Juma Musjid* para 18; Arendse (2011) *LDD* 344.

³⁶ CESCR *General Comment No 13: The right to education* UN Doc E/C/12/1999/10 (1999) para 1. See further Coomans "In search of the core content of the right to education" in *Exploring the Core Content of Socio-Economic Rights* 159,160; Pieterse (2004) *TSAR* 709; Bekker G "The right to education in the South African Constitution: An introduction" in Mashava LV (ed) *A compilation of essential documents on the right to education* (2000) 1.

³⁷ Coomans F "In search of the core content of the right to education" in Chapman AR (ed) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 217-246 at 219. See also Simbo C "The right to basic education, the South African Constitution and the *Juma Musjid* case: An unqualified human right and a minimum core standard" (2013) 17 *LDD* 477-503 at 484.

³⁸ Walsh B "Existence and meaning of fundamental rights in the field of education in Ireland" (1981) 2 *Human Rights Law Journal* 319-327 at 319,320.

³⁹ Pieterse (2004) *TSAR* 709. See also Bray W *Human rights in education* (2000) 79.

learners and in doing so lay a strong foundation for the development of all our people's talents and capacities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages [...]"

Devenish states that:

"Education is of cardinal importance for meaningful human existence. It allows individuals to develop whole and mature personalities, and it empowers them to fulfil a role in the community that is enriching for themselves and is beneficial for the community. Education is inextricably intertwined with culture, since it cannot take place in a vacuum. All education involves a cultural dimension and the imparting of a system of values. Education in a democratic body politic and a plural society requires that there should be inculcated in people a respect and tolerance for religious, linguistic and cultural diversity, without preventing the transmission of values of the individual cultures in a particular community."⁴⁰

It is clear from the quotations above that education empowers people. In *Minister of Basic Education v Basic Education for All*,⁴¹ the court emphasised that "basic education should be seen as a primary driver of transformation in South Africa."⁴² The transformative nature of education establishes a human rights culture that benefits society as a whole.⁴³ Therefore, education should not only be a tool to teach basic skills but as a tool to transform society, which enables members of society to enjoy equality, dignity and freedom.⁴⁴ In light of the discussion above, the drafters of the Constitution also deemed it fit to divide the bundle of education rights into subsections.⁴⁵ Each subsection confer separate and specific entitlements on right-holders, and the different subsections place different obligations on the State that vary in degree and nature.⁴⁶ In order to determine the different obligations on the State in respect of the right to a basic education in particular, it is important to explore the nature of the right to a basic education.

⁴⁰ Devenish DE "Aspects of the right to education in the constitution" (1998) 2 *De Jure* 224-240 at 225.

⁴¹ 2016 1 All SA 369 (SCA).

⁴² 2016 1 All SA 369 (SCA) para 40. See also *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng* 2016 4 SA 546 (CC).

⁴³ Pieterse (2004) TSAR 714.

⁴⁴ Pieterse (2004) TSAR 714. See also *Section 27 v Minister of Basic Education* 2012 3 All SA 579 (GNP) para 5 where the court stated that education is "an indispensable tool" in the larger transformation project.

⁴⁵ Veriava F & Coomans F "Right to education" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (2005) 57-83 at 59.

⁴⁶ 59.

3 Interpretation of the right to a basic education

3 1 The nature of the right to a basic education

3 1 1 Introduction

The right to a basic education has been described as a stronger right than other socio-economic rights guaranteed in the Constitution.⁴⁷ *Governing Body of the Juma Masjid Primary School v Essay* (“*Juma Masjid*”)⁴⁸ affirms that the right to a basic education is essentially distinct from the other socio-economic rights in the Constitution.⁴⁹ This section will explore the fundamental aspects in which the right to a basic education differs from other socio-economic rights.

3 1 2 Textual differences between section 29(1)(a) and other socio-economic rights

The nature of the right to basic education can be described as follows:

“...an unqualified right requiring the propriety attention of the State, also in respect of budgetary allocations [...]. The right refers to education up to a level of functional literacy, in order words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics.”⁵⁰

Section 29(1)(a) of the Constitution is a right to a basic education, whereas other socio-economic rights, like section 26(1) and section 27(1) of the Constitution is respectively a right of access to housing and to health care. Thus, the right to a basic education is not articulated the same as other socio-economic rights.⁵¹ In *Juma Masjid*, Nkabinde J recognised the absence of textual qualifiers in section 29(1)(a) of the Constitution. Firstly, the word “access” has been left out of the wording of section 29(1)(a) as opposed to other socio-economic rights. This ought to be seen as a deliberate action by the drafters of the Constitution to ensure that basic education is accessible and provided to the beneficiary.⁵² Hence, the beneficiary of the right is

⁴⁷ Seleane M “The right to education: Lessons from Grootboom” (2003) 7 *LDD* 137-169 at 140. See also Skelton A “How far will courts go in ensuring the right to basic education” (2012) 27 *SAPL* 393-408 at 395.

⁴⁸ 2011 8 *BCLR* 761 (CC).

⁴⁹ *Juma Masjid* para 37. See also *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA); *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM); *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG).

⁵⁰ Taiwo EA *The implementation of the right to education in South Africa and Nigeria* doctoral thesis, Nelson Mandela University (2011) 117.

⁵¹ Skelton (2012) *SAPL* 395.

⁵² Simbo (2013) *LDD* 487.

offered a basic education, not only access to basic education.⁵³ This means that the State must provide everyone with a basic education.⁵⁴

Secondly, the right to a basic education is not subject to standard socio-economic rights limitations such as to “take reasonable legislative and other measures...”⁵⁵ This internal limitation lies at the heart of the Constitutional Court’s textual argument for the adoption of a reasonableness standard for other socio-economic rights, such as the rights to housing and health care.⁵⁶ Therefore, the right to a basic education cannot be fulfilled unless everyone receives a basic education.⁵⁷

Similarly, the constitutional text for both the rights to access housing and health care relates the progressive realisation of the right. In contrast, section 29(1)(a) of the Constitution does not contain the same qualifying language as the provisions identified above. In *Grootboom*, Yacoob J described progressive realisation in the following terms:

“It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but a wider range of people as time progresses.”⁵⁸

Basic education is not a good that can be made available to more people “over time.”⁵⁹

Finally, the right to a basic education is not dependent on the availability of resources.⁶⁰ Bekker argues that the resource constrictions would not find application when determining the content of the right to a basic education.⁶¹ Thus, the right to a basic education does not merely require the State to take reasonable steps within available resources for the right to be realised.⁶² The right must be interpreted as it is found in its constitutional text and not with reference to the available resources of the State. The right to a basic education has been described as a strong positive right,

⁵³ Seleane (2003) *LDD* 141. See also Woolman S & Bishop M “Education” in Woolman S, Bishop M & Brickhill J (eds) *CLOSA* 2 ed (RS 1 2009) 57-01–57-93 at 57-10, 57-11.

⁵⁴ Veriava “Realising the right to basic education” in *Socio-economic rights* 89. See also Seleane (2003) *LDD* 142; *Juma Musjid* para 37.

⁵⁵ Section 26(2) and section 27(2) of the Constitution. See further Fleisch B & Woolman S *The Constitution in the classroom* (2009) 121.

⁵⁶ Fleisch & Woolman *Constitution in the Classroom* 121.

⁵⁷ 121.

⁵⁸ *Grootboom* para 45.

⁵⁹ Fleisch & Woolman *Constitution in the Classroom* 121.

⁶⁰ Fleisch & Woolman *Constitution in the Classroom* 121. See also Seleane (2003) *LDD* 140, 141.

⁶¹ Bekker “The right to education” in *A complication of essential documents on the right to education* 7.

⁶² McConnachie C & McConnachie C “Concretising the right to a basic education” (2012) 129 *SALJ* 554-590 at 556. See also Skelton (2012) *SAPL* 396.

which means that the right is asserted regardless of the availability of resources to the State.⁶³ It may be suggested that the availability of resources may be considered when limiting the right to a basic education in terms of section 36 of the Constitution.⁶⁴ However, the limitation of the right to a basic education is not integral to the fundamental construction of the right itself. The limitation in terms of section 36 of the Constitution is something different from the meaning of the right. Therefore, establishing the meaning of basic education is a fundamental precondition to limiting a right, otherwise there will be uncertainty regarding what is being limited.⁶⁵ The desire to limit the right to a basic education based on the availability of resources must be problematised.⁶⁶ If a right should have been limited to the available resources of the State, the Constitution would have provided for it.⁶⁷ Thus, the omission to subject the right to a basic education to the availability of resources indicates that the subjectivity thereof is not desired.⁶⁸ Furthermore, to limit the right on the basis of available resources would defeat the objective of the right, namely, to free the right from any limitations.⁶⁹

The primary difference between section 29(1)(a) and other socio-economic rights is that the right to a basic education is primarily “defined as an entitlement to a good rather than an action,”⁷⁰ that is, to take reasonable steps to progressively realise the right within available resources.⁷¹ This sets the right apart from other socio-economic rights as the right to a basic education is a priority right.⁷² Therefore, the constitutional text of section 29(1)(a) of the Constitution indicates that unlike other socio-economic rights, the right to a basic education is not dependant on the availability of resources,

⁶³ Berger E “The right to education under the South African Constitution” (2003) 103 *Col LR* 614-661 at 625. See also Simbo (2013) *LDD* 488.

⁶⁴ Arendse L “Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Musjid*” (2020) 20 *AHRLJ* 285-314 at 291.

⁶⁵ Seleane (2003) *LDD* 140.

⁶⁶ 140.

⁶⁷ 140, 141.

⁶⁸ 141.

⁶⁹ 141.

⁷⁰ Fredman S *Human rights transformed: Positive rights and positive duties* (2008) 88-90. See also McConnachie & McConnachie (2012) *SALJ* 564.

⁷¹ Fredman *Human rights transformed* 88-90. See also McConnachie & McConnachie (2012) *SALJ* 564.

⁷² Arendse (2020) *AHRLJ* 288, 313. See also *Juma Musjid* para 37; McConnachie & McConnachie (2012) *SALJ* 561, 564; Roithmayr D “Access, adequacy and equality: The constitutionality of school fee financing in public education” (2003) 19 *SAJHR* 382-429 at 404.

it is not subject to a reasonableness standard, and is the source of an immediate, direct, and specific entitlement.⁷³

3 1 3 Concluding remarks

The Constitutional Court made it clear that the right to a basic education is an unqualified right. This means that everyone has a direct claim in respect of the right.⁷⁴ It is an unqualified, unconditional, and absolute right.⁷⁵ Furthermore, the State is also under an immediate obligation to provide basic education. While the nature of the right to a basic education is different from the nature of other qualified socio-economic rights, the Constitutional Court still has to determine the content of the right for learners attending public schools.⁷⁶ Given the historical account of the education system in South Africa, determining the content of the right is of paramount importance. The next section aims to interpret the right to a basic education.

3 2 The formal and substantive understanding of the right to a basic education

3 2 1 Introduction

The term “basic education” is not defined in the Constitution, nor was it defined in the Interim Constitution, or in any legal instrument.⁷⁷ Generally, two approaches have been adopted to define the term “basic education” as used in South African legislation and education policy.⁷⁸ Woolman and Fleisch suggested that there are two possible approaches to interpret the right to a basic education. The first approach to interpreting

⁷³ Fleisch & Woolman *Constitution in the Classroom* 121.

⁷⁴ Seleane (2003) *LDD* 141,142. See also Veriava F & Skelton A “The right to basic education: A comparative study of the United States, India and Brazil” (2019) 35 *SAJHR* 1-24 at 3; Arendse (2020) *AHRLJ* 310,311.

⁷⁵ Seleane (2003) *LDD* 140,141. See also Skelton (2012) *SAPL* 396; Woolman & Bishop “Education” in *CLoSA* 57-05; Veriava F & Coomans F *The right to education’ socio-economic rights in South Africa* (2005) 62; Veriava “Realising the right to basic education” in *Socio-economic rights* 89,90; Paterson (2018) *SAJHR* 115.

⁷⁶ Franklin S & McLaren D *Realising the right to basic education in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to a basic education* (2015) Studies in Poverty and Inequality Institute, Working Paper 10 3. See further Veriava & Coomans “Right to education” in *Socio-economic rights* 61,62; Arendse L “The obligation to provide free basic education in South Africa: An international law perspective” (2011) 14 *PELJ* 97-127 at 98.

⁷⁷ Seleane (2003) *LDD* 143. See also Simbo (2012) *LDD* 167,164; Merabe MJ *The core content of public school learners’ right to a basic education in terms of section 29(1)(a) of the Constitution* master’s thesis, University of the Free State (2012) 43,44; Arendse (2019) *LDD* 108; Skelton A *Strategic litigation impacts: equal education for all*, Report commissioned by Open Society Justice Initiative: Open Society Foundation Education Support Program (2017) 13.

⁷⁸ Woolman & Bishop “Education” in *CLoSA* 57-11. See also Murungi LN “Inclusive basic education in South Africa: Issues in its conceptualisation and implementation” (2015) 18 *PELJ* 3160–3195 at 3162.

the right to a basic education is to consider the period of time a learner is in school.⁷⁹ This is the formal understanding of the right to a basic education. The second approach is the standard of schooling, which has been described as the substantive approach to interpreting the right to a basic education.⁸⁰ This approach has to do with the adequacy of schooling.⁸¹ The main aim of this section is to determine what the formal and substantive understanding of the right to a basic education is in the South African context.

3 2 2 The formal understanding of the right to a basic education

Section 29(1)(a) of the Constitution guarantees the right to a basic education, and section 29(1)(b) states that “everyone has the right to further education, which the State, through reasonable measures, must make progressively available and accessible.” It is evident that the Constitution promises some level of education, however, that level is not easy to determine.⁸² In light of this, the “cut-off” between basic and further education remains a matter of debate.⁸³ The 1995 White Paper on Education and Training (“White Paper 1”)⁸⁴ suggests that the meaning of basic education is settled by policy in such a way that it affirms the intention of the Constitution.⁸⁵ White Paper 1 cites article 1 of the World Declaration,⁸⁶ which states that:

“every child, youth or adult shall be able to benefit from educational opportunities designed to meet their needs; the said needs comprise of tools such as literacy, oral expression, numeracy, problem solving, knowledge, skills, values and attitudes, which human beings require in order to survive, develop their full capacities, live and work with dignity, participate fully in development, improving the qualities of their lives, make informed decisions, and continue learning.”⁸⁷

⁷⁹ Fleisch & Woolman *Constitution in the classroom* 127. See also Woolman & Bishop “Education” in *CLOSA* 57-11–57-15; Skelton (2012) *SAPL* 397; Merabe *Core content* 44.

⁸⁰ Fleisch & Woolman *Constitution in the classroom* 113. McConnachie & McConnachie (2012) *SALJ* 565. See also Veriava *Realising the right to basic education* 52,90.

⁸¹ Fleisch & Woolman *Constitution in the Classroom* 130. See also Woolman & Bishop “Education” in *CLOSA* 57-15,57-16; Merabe *Core content* 44; Simbo (2012) *LDD* 16.

⁸² Berger (2003) *Col LR* 624.

⁸³ 625.

⁸⁴ Department of Education *White paper on Education and Training in a democratic South Africa: First steps to develop a new system* GN 196 in GG 16312 of 15 March 1995 (“White Paper 1”).

⁸⁵ *White Paper 1* chapter 7, para 12. See also Chürr *A child’s right to a basic education* 121.

⁸⁶ UNESCO *World declaration on education for all and framework for action to meet basic learning needs* adopted by the World Conference on Education for All in Jomtien, Thailand (5-9 March 1990).

⁸⁷ *White Paper 1* para 13. See also Seleokane (2003) *LDD* 143.

This passage indicates that basic education must be defined in terms of the learning needs appropriate to the experience and age of a learner.⁸⁸ However, White Paper 1 also states that the design of educational programmes to the level of General Education and Training (“GET”) would define the right to a basic education, adequately.⁸⁹ White Paper 1 further states that:

“Appropriately designed education programmes to the level of the proposed General Education Certificate (GEC) (one year reception class plus 9 years of schooling), whether offered in a school to children, or through other forms of delivery to young people and adults, would adequately define basic education for purposes of constitutional requirements.”⁹⁰

Moreover, the Department of Education (“DoE”) also defines basic education as a “general education... to span from grades 1-9.”⁹¹ Additionally, section 3(1) of SASA provides that “attendance at school is compulsory for learners from the ages of 7 years until the age of 15 years or until the learner reaches grade 9, whichever occurs first.” This interpretation coincides with the GET perspective described above.⁹² Therefore, SASA also interprets the right to a basic education as the period of schooling a learner receives from grade R to 9.

It is evident from above that the government contends that basic education means grade 1-9.⁹³ Skelton argues that the issue with linking section 3(1) of SASA too closely to the right to a basic education is that “courts have not yet pronounced on whether the right of a child who is older than 15 years and beyond grade 9 is still entitled to enjoy and enforce [their] right to [a] basic education.”⁹⁴ Hence, there is no clear line that can be drawn to what grade level qualifies as basic education.⁹⁵ It is evident that the drafters of the Constitution wanted to address each level of education separately in order to attach different obligations on the right depending on the nature of the right.⁹⁶ As described above, the nature of the right to a basic education is that it is a direct and immediately enforceable right, and only subject to limitation in terms of

⁸⁸ *White Paper 1* chapter 7, para 14.

⁸⁹ Chapter 7, para 15.

⁹⁰ Chapter 7, para 15.

⁹¹ Department of Education *Education in South Africa: Achievements since 1994* (2001) 17.

⁹² *White Paper* chapter 7. See also Malherbe R “Educational rights” in Boezaart T (ed) *Child Law in South Africa* (2009) 399-419 at 404.

⁹³ Seleane (2003) *LDD* 144.

⁹⁴ Skelton (2012) *SAPL* 403.

⁹⁵ *Calderhead V* “The right to an adequate and equal education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education” available at: <http://www.section27.org.za/wp-content/.../The Right to a Basic Education.pdf> (March 2011) para 13.

⁹⁶ *Calderhead* “The right to an adequate and equal education” para 94.

section 36 of the Constitution.⁹⁷ Section 29(1)(b) of the Constitution creates an obligation on the State to make further education progressively available and accessible through reasonable measures. Thus, unlike the right to a basic education in section 29(1)(a) of the Constitution, the right to further education has two internal qualifiers, that is, the entitlement is only to “reasonable measures” and the constitutional entitlement is one of “progressive realisation.”

In light of the above, it is contended that the language used in section 29 of the Constitution suggests that the right to a basic education includes more than just the GET phase of schooling.⁹⁸ Section 29(1)(b) of the Constitution speaks to further education, which is understood to be higher or tertiary education, that is, post-matric schooling.⁹⁹ Therefore, section 29(1)(a) of the Constitution makes provision for the GET, grades R to 9, and Further Education and Training (“FET”), grade 10 to 12, phases of schooling.¹⁰⁰ The FET phase of schooling has been described as more complex than the GET phase as it is completed by learners in preparation for further education.¹⁰¹ Moreover, the FET phase, and more specifically the National Senior Certificate, holds high rewards for learners and their families as it is a gateway to a higher education institution or employment.¹⁰²

The right to a basic education therefore includes the GET and FET phases of schooling, stretching from grades R to 12, as the same set of constitutional and international obligations are imposed on the State for these two phases of schooling. Thus, the formal understanding of the right to a basic education forms the basis of this study. It will become evident later that the State’s constitutional and international obligations are in terms of the formal understanding of the right to a basic education. The obligations imposed on the State in terms of the right to a basic education will be discussed in section 4 below.

⁹⁷ See section 3 1 above.

⁹⁸ Roithmayr (2003) *SAJHR* 393. See also Calderhead “The right to an adequate and equal education” para 57.

⁹⁹ Calderhead “The right to an adequate and equal education” para 99 n 83.

¹⁰⁰ The GET phase of schooling is the responsibility of the Department of Basic Education. Furthermore, grades 10 to 12 is included under the Further Education and Training (“FET”) band of schooling. Similarly, the Department of Basic Education is also responsible for grades 10 to 12 at schools. The FET phase also includes vocational programmes at FET colleges. The Department of Basic Education and the Department of Higher Education and Training shares responsibility for this band.

¹⁰¹ Department of Education *Education in South Africa* 28.

¹⁰² 28.

3.2.3 *The substantive approach to interpreting the right to a basic education*

As mentioned above, the content of the right to a basic education has not yet been determined by South African courts.¹⁰³ Nevertheless, there has been some instrumental judicial decisions addressing some aspects of interpreting the right to a basic education.¹⁰⁴ In this light, it is imperative to understand the history of education in the South African context and the context under which the right to a basic education has been codified in the Constitution.¹⁰⁵ Moreover, one must also have regard for the transformative role of education.

When a provision in the Bill of Rights is interpreted, a reviewing court must take its context and history into account.¹⁰⁶ Accordingly, the Constitutional Court has adopted a contextual method in interpreting socio-economic rights in the Bill of Rights.¹⁰⁷ This approach requires that a socio-economic right to be interpreted in two types of contexts. The first is to understand the right in its textual context, which is to consider Chapter 2 of the Constitution as a whole.¹⁰⁸ Secondly, that this right must also be understood in terms of its social and historical context.¹⁰⁹ The post-apartheid State inherited an education system that was grossly unequal as former White schools were treated more favourably by the apartheid government than former Black schools.¹¹⁰

The Constitutional Court in *Juma Musjid* and *Ermelo* recognised the historical impact that education had on inequality in South Africa, and the necessity for every South African to have access to a basic education.¹¹¹ In doing so, courts have been inclined to follow the substantive approach to the interpretation of the right to a basic education. In *Juma Musjid*, Nkabinde J preferred the substantive approach to basic education by

¹⁰³ Seleane (2003) *LDD* 143. See also Simbo (2012) *LDD* 164,167; Merabe *Core content* 43,44; Arendse (2019) *LDD* 108; Skelton *Strategic litigation impacts: equal education for all* 13.

¹⁰⁴ *Juma Musjid; Western Cape Forum for Intellectual Disability v Government of South Africa* 2011 5 SA 87 (WCC); *Centre for Child Law v Government of the Eastern Cape Province* Unreported case number 504/10 of 2011; *Centre for Child Law v Minister of Basic Education* 2013 3 SA 183 (ECG).

¹⁰⁵ See section 3 in Chapter 2.

¹⁰⁶ *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* 2000 1 SA 661 (CC) para 44 states that “[a] provision in a Constitution must be construed purposively and in the light of the constitutional context in which it occurs. Our history, too, may not be ignored in that process.” See also *South African Police Service v Public Servants Association* 2007 3 SA 521 (CC) para 19 states that the Constitution “must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past, lay the foundations for a democratic and open society, improve the quality of life for all and build an united and democratic South Africa.”

¹⁰⁷ *Grootboom* para 24.

¹⁰⁸ Para 22.

¹⁰⁹ Paras 22 & 25.

¹¹⁰ Johnson (1982) *Anthropology & Education Quarterly* 217.

¹¹¹ Franklin & McLaren *Realising the right to basic education in South Africa* 3.

referring to its purpose as it is consistent with the transformative role of education.¹¹²

Nkabinde J held:

“The significance of education, in particular basic education, for individuals and societal development in our democratic dispensation in light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

Indeed, basic education is an important socio-economic right directed, among other things at promoting and developing a child’s personality, talents and mental potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities.”¹¹³

In *Section 27 v Minister of Education*,¹¹⁴ Kollapen J also adopted a substantive approach to the right to a basic education. Kollapen J stated that:

“In the context of this application one of those components is the provision of textbooks and while it may be said that no consensus exists broadly in the South African context, on the content of the right to basic education, even though there have been compelling arguments that it must and should, in order to be meaningful, include such issues as infrastructure, learner transport, security at schools, nutrition and such related matters.”¹¹⁵

Accordingly, some scholars have also adopted the substantive approach to interpreting the right to a basic education. Skelton argues that “basic education does not relate to the number of years of education to which [the learner] is entitled to.”¹¹⁶ Furthermore, learners who do not complete grade 9 are not properly prepared with the skills, knowledge, and experience to face the challenges in society.¹¹⁷ Consequently, it will affect the learner’s ability to reach their full potential, to live and work with dignity, self-respect, and self-assurance, and to improve their quality of life.¹¹⁸ McConnachie and McConnachie argues that if the right to a basic education was just interpreted as a mere entitlement to a place in a school for a defined period of schooling then it would have nothing to say about the inadequacy of that schooling or the inequalities that remain in the basic education system.¹¹⁹ Moreover, the period of schooling approach is merely contingently related to the right to a basic education as the period of schooling does not guarantee that a learner has received the education as described

¹¹² *Juma Masjid* para 38.

¹¹³ Paras 42 & 43 (footnotes omitted).

¹¹⁴ 2012 3 All SA 579 (GNP).

¹¹⁵ Para 22.

¹¹⁶ Skelton (2012) *SAPL* 403.

¹¹⁷ Chürr (2015) *PELJ* 2411.

¹¹⁸ Khoza S *Socio-economic rights in South Africa: A resource book* (2007) 420.

¹¹⁹ McConnachie & McConnachie (2012) *SALJ* 566. See further Skelton (2012) *SAPL* 403,404.

above.¹²⁰ This interpretation is also consistent with the discussion by the court in *Juma Musjid* as described above.¹²¹ The courts expect more of the right to a basic education, as it is consistent with the court's insistence that constitutional rights must be given transformative content, and promote social justice.¹²² Therefore, the substantive approach to basic education is more than just a right to a period of formal schooling. However, even though the substantive understanding is more than the period of schooling, this thesis builds its argument on the formal understanding of the right to a basic education. The formal understanding of the right to a basic education specifically focusses on the period of schooling namely, grade R to 12.

3 3 Regional international law and international law discourse

3 3 1 Introduction

The right to a basic education is recognised as a human right by a variety of international and regional international instruments. Section 39(1)(b) of the Constitution requires the courts to consider international law when interpreting rights in the Bill of Rights.¹²³ South Africa has signed and ratified a number of international instruments that will be set out below. However, where South Africa has not ratified an international instrument, it will still serve as a fundamental guide to interpret the right to a basic education. In *S v Makwanyane*,¹²⁴ the court stated that "binding and non-binding international law are applicable in interpreting rights in the Bill of Rights."¹²⁵ This section will set out the regional international and international instruments that recognises the right to a basic education together with interpretive tools that provide concrete content to the right to a basic education.

¹²⁰ McConnachie & McConnachie (2012) SALJ 566.

¹²¹ *Juma Musjid* para 42.

¹²² *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21: "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, *social justice* and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole." See also *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 25; Klare (1998) SAJHR 146; McConnachie & McConnachie (2012) SALJ 566.

¹²³ Section 39(1)(b) states: "When interpreting the Bill of Rights, a court, tribunal or forum... (b) must consider international law..."

¹²⁴ 1995 3 SA 391 (CC).

¹²⁵ Para 35.

3 3 2 *The Universal Declaration of Human Rights*

Article 26 of the Universal Declaration of Human Rights (“UDHR”)¹²⁶ was the first international instrument to recognise educational rights.¹²⁷ Article 26 provides that “everyone has the right to education” and that “education shall be free, at least in the elementary and fundamental stages.” Furthermore, article 26(1) recognises that education is a life-long and continuous process. The UDHR further states that education should be aimed at the development of human personality and the enhancement of other rights and freedoms. Moreover, that education should foster understanding, tolerance, and friendships in societies.¹²⁸

3 3 3 *Convention on the Rights of the Child*

The Convention on the Rights of the Child (“CRC”)¹²⁹ insists upon the need for education to be child friendly, child centred, and empowering.¹³⁰ Article 28(1) of the CRC recognises the right of a child to receive education with the view of achieving its realisation progressively and equal for all. Furthermore, article 28(1)(a) of the CRC also compels the State to make primary education compulsory and free for all.

Article 29(1) of the CRC sets out the aims of education. It requires State Parties to agree that the education of the child shall be directed to the following:

- “(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- “(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- “(c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- “(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- “(e) The development of respect for the natural environment.”

¹²⁶ Resolution 217 (III) of 10 December 1948, UN doc A/810.

¹²⁷ Beiter KD *The protection of the right to education* (2006) 90. See also Arendse (2011) *PELJ* 98,103; Devenish (1998) *De Jure* 227.

¹²⁸ Devenish (1998) *De Jure* 227.

¹²⁹ 1577 UNTS 3 (1989). South Africa signed the CRC convention in 1993 and ratified it on the 16th of June 1995.

¹³⁰ Committee on the Rights of the Child *General Comment no 1: The aims of education* CRC/GC/2001/1 (2001) para 2.

3 3 4 *International Covenant on Economic, Social and Cultural Rights*

Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),¹³¹ sets out the aims and objectives of education. It provides that:

“The State parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups, and further activities of the United Nations for the maintenance of peace.”

South Africa ratified the ICESCR in 2015. However, South Africa issued a declaration pertaining to the ratification process of the ICESCR. The declaration stated that:

“The Government of the Republic of South Africa will give progressive effect to the right to education, as provided in Article 13(2)(a) and Article 14, within the framework of its National Education Policy.”¹³²

Scholars have argued that the declaration undermines the Constitution as the declaration seems to qualify the ratification of the ICESCR by attempting to include the terms “progressive realisation” and “available resources” into the section 29(1)(a) right.¹³³ Therefore, it has been submitted that it “constricts” the right, and that the National Education Policy should be drafted in compliance with the right, and not *vice versa*.¹³⁴ It is clear from the discussion above that the right to a basic education is an unqualified right.¹³⁵ It seems that the declaration issued by the South African government is in conflict with the provision in the Constitution, and that the government is seemingly trying to “water down” its duties to provide access to basic education for all learners in South Africa. However, it must also be recognised that under the ICESCR, the minimum core obligations imposed on the South African government is to ensure free and compulsory education.¹³⁶ Moreover, the Committee on Social, Economic and Cultural Rights (“CESCR”) does take “account of resource constraints

¹³¹ 993 UNTS 3 (1976). South Africa signed the ICESCR on 3 October 1994 and ratified it on the 12th of January 2015.

¹³² United Nations *International Covenant on Economic, Social and Cultural Rights: South Africa: Ratification* C.N.23.2015.TREATIES-IV.3 (2015) available at: http://www.seri-sa.org/images/ICESR_CN_23_2015-Eng.pdf

¹³³ Section27 et al. “Joint statement: SA government’s ratification of the ICESCR” (21 January 2015) available at: <https://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/>

¹³⁴ Section27 et al. “Joint statement: SA government’s ratification of the ICESCR” (21 January 2015) available at: <https://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/>

¹³⁵ See section 3 1 above. See also *Juma Musjid* para 37.

¹³⁶ Arendse (2011) *PELJ* 109.

applying within the country concerned”¹³⁷ when assessing whether a State has complied with its minimum core obligations. Furthermore, even though the right cannot be subjected to the “progressive realisation” qualifier, the right should at least be prioritised above other socio-economic rights which are subjected to this qualifier.¹³⁸ Even though this declaration issued by the South African government seems to “water down” its obligations to providing learners with access to basic education, the contrary will be argued later in this thesis.¹³⁹

Education is an essential tool that strengthens respect for all human rights and fundamental freedoms in order to ensure that its beneficiaries participate in a free and open society.¹⁴⁰ General Comment No 13 published by the CESCR provides the “most comprehensive description” of the right to a basic education in international law.¹⁴¹ General Comment No 13 embeds the 4-A Scheme which gives concrete content to the right to a basic education.¹⁴² This includes the essential elements of availability, accessibility, acceptability and adaptability.¹⁴³

3 3 5 The 4-A Scheme

The 4-A scheme is a valuable instrument for interpreting the right to a basic education as it gives concrete content to the right to a basic education.¹⁴⁴ It also serves as a standard against which the government’s performance towards the right to a basic education can be measured.¹⁴⁵ It was developed by Katarina Tomasevski and was endorsed in General Comment No 13 published by the CESCR.¹⁴⁶ Thus, the

¹³⁷ CESCR *General Comment No 3: The nature of State Parties’ obligations (Art.2, para 1, of the Covenant)* E/1991/23 (1990) para 10.

¹³⁸ Arendse (2011) *PELJ* 110.

¹³⁹ See section 4 2 3 2 in Chapter 3 and the analysis in chapter 5.

¹⁴⁰ Arendse (2011) *PELJ* 100.

¹⁴¹ 100.

¹⁴² 100.

¹⁴³ CESCR *General Comment No 13* (1999) para 8.

¹⁴⁴ Arendse (2011) *PELJ* 100.

¹⁴⁵ CESCR *General Comment No 13* (1999) para 6(a). See further Malherbe “Educational rights” in *Child Law in South Africa* 402; Tobin J *The UN Convention on the Right of the Child* (2019) 1067; Skelton A “The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent case law” (2013) 46 *De Jure* 1-23 at 4.

¹⁴⁶ United Nations High Commissioner for Refugees “Progress report on the right to education” E/CN.4/2002/60 (2002) paras 27-29. See also Tomasevski K *Human rights obligations: Making education available, accessible, acceptable and adaptable* (2001) 7; CESCR *General Comment No 13* (1999).

interrelated 4-A Scheme contains the vital features for the effective creation and provision of the right to a basic education.¹⁴⁷

3 3 5 1 Availability

The element of availability refers to the availability of resources, such as educational institutions and programmes, in order to access basic education.¹⁴⁸ The element of availability refers to what the State must physically provide for education to take place. This includes legislation to ensure compulsory basic education, physical infrastructure of schools, teachers, and learning materials.¹⁴⁹ According to the CESCR this can be interpreted to mean that the State is obligated to have an overall development strategy for its school system.¹⁵⁰ In this light, it is clear that the overall strategy should be of priority to the State and must be implemented as a matter of urgency to ensure the availability of basic education to all learners.

3 3 5 2 Adequacy / Acceptability

The State has the duty to ensure that the substance and form of education, including the curriculum and teaching methods, are acceptable and relevant.¹⁵¹ Thus, the duties on the State is to ensure that the basic education provided is reliable, consistent, and stable with the human rights of the child as set out in articles 28 and 29 of the CRC.¹⁵² Veriava and Coomans explain that acceptability refers to whether the curricula and teaching materials are sufficient to meet the basic learning needs of a learner.¹⁵³ Reyneke explains that acceptability of education has an express quality dimension.¹⁵⁴ Reyneke further states that if a learner does not receive education of an acceptable academic standard, it would constitute a violation of the right to a basic education.¹⁵⁵

¹⁴⁷ Liebenberg *Socio-economic rights* 243.

¹⁴⁸ Tobin *The UN Convention on the Right of the Child* 1067. See also Roithmayr (2003) *SAJHR* 393; Chürr (2015) *PELJ* 2414; Skelton (2013) *De Jure* 5; Khumalo *Some implications* 81.

¹⁴⁹ CESCR *General Comment No 13* (1999) para 6(a). See also Arendse (2011) *PELJ* 112; Khumalo *Some implications* 81.

¹⁵⁰ CESCR *General Comment No 13* (1999) para 25. See also Tobin *The UN Convention on the Right of the Child* 1067.

¹⁵¹ CESCR *General Comment No 13* (1999) para 6(c). See further Chürr (2015) *PELJ* 2414; Skelton (2013) *De Jure* 5; Khumalo *Some implications* 82.

¹⁵² Chürr (2015) *PELJ* 2414.

¹⁵³ Veriava & Coomans *The right to education's socio-economic rights in South Africa* 71.

¹⁵⁴ Reyneke JM *The best interest of the child in school discipline in South Africa* doctoral thesis, Tilburg University (2013) 326.

¹⁵⁵ 326,327.

3 3 5 3 Adaptability

Adaptability refers to the flexibility and expandability of the education system to adapt to changing societies and communities.¹⁵⁶ Woolman and Fleisch state that education must be flexible so that it can adapt to the needs of a changing society and the needs of learners.¹⁵⁷ In doing so, the State must respond to the needs and requirements of learners within their cultural and societal circumstances. Hence, it is necessary for the curriculum to be flexible and adaptable.¹⁵⁸

3 3 5 4 Accessibility

It has been submitted that within the context of the CRC, accessibility has three dimensions.¹⁵⁹ Firstly, article 28 of the CRC secures the right to education on the basis of equal opportunity. Secondly, physical accessibility which means that the school must be physically safe, especially for learners from rural areas.¹⁶⁰ The mere construction of schools will not be sufficient if certain learners cannot access schools.¹⁶¹ It requires schools to be built, stocked with qualified educators and learning materials. Thirdly, public schools must also be economically accessible and affordable to all learners.¹⁶² This element is subject to the wording of article 13(2) of the ICESCR which states that “primary education shall be free.”¹⁶³ General Comment No 11,¹⁶⁴ differentiates between various costs incurred by education. The CESCR emphasises

¹⁵⁶ CESCR *General Comment No 13* (1999) para 6(d). See further Roithmayr (2003) *SAJHR* 394; Chürr (2015) *PELJ* 2414; Skelton (2013) *De Jure* 5.

¹⁵⁷ Fleisch & Woolman *Constitution in the Classroom* 134-135.

¹⁵⁸ Chürr (2015) *PELJ* 2414.

¹⁵⁹ CESCR *General Comment no 13* (1999) para 6(b). See also Roithmayr (2003) *SAJHR* 385; Chürr (2015) *PELJ* 2414.

¹⁶⁰ CRC Committee, CO Norway, CRC/C/15/Add.126 para 47. The Committee suggested that the State party must look to making formal education more accessible to learners who travel for part of the year, for example, distance learning programs.

¹⁶¹ Tobin *The UN Convention on the Right of the Child* 1068.

¹⁶² Coomans F “Justiciability of the right to education” (2009) 2 *Erasmus Law Review* 427-443 at 427, 437. See also Khumalo *Some implications* 78.

¹⁶³ Article 5 of the World Declaration on Education for All states that primary education is the main delivery system for the basic education of children outside the family is primary schooling. Therefore, primary education must be universal, as well as ensuring that the basic learning needs of all children are satisfied. Moreover, primary education must take into account the culture, needs and opportunities of the community. While “primary education” and “basic education” are not synonyms, there is a close relationship between the two concepts. Furthermore, UNICEF has stated that primary education is the most important component of a basic education. In light of this, this thesis takes the same approach. Therefore, for purposes of this thesis, the concepts of primary and basic education are not synonyms but that it is closely linked to each other and interrelated to each other. Therefore, this thesis adopts the approach taken by UNICEF and article 5 of the World Declaration.

¹⁶⁴ CESCR *General Comment No 11: Plans of Action for Primary Education (Art. 14 of the Covenant)* E/1992/23 (1999).

that the scope of free primary education as it reaches beyond the prohibition on charging school fees.¹⁶⁵ General Comment No 11 defines the meaning of free basic education as follows:

“The nature of this requirement is unequivocal. The right [to primary education] is expressly formulated as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardise its realisation. They are also often highly regressive in effect. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee’s examination on a case-by-case basis.”¹⁶⁶

In *Juma Musjid* the court identified access as an essential component of the right to a basic education. It stated that:

“Basic education provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.”¹⁶⁷

Tobin suggests that accessibility means that education should be open to all, especially to the marginalised and vulnerable people in society.¹⁶⁸ In this light, accessibility requires that educational institutions and facilities be accessible to all learners, without discrimination, and within the jurisdiction of South Africa.¹⁶⁹ Accessibility is a necessity for the full achievement of the right to a basic education.¹⁷⁰ According to Malherbe, accessibility refers to the learner’s ability to enrol in school and to attend school.¹⁷¹ Hence, the accessibility element of the right to an education means that no one may be denied an education.¹⁷² Woolman and Fleisch explain accessibility as follows:

“Accessibility takes account of three discrete factors: non-discrimination, financial accessibility, physical accessibility. Accessibility engages both negative dimensions and positive dimensions of the right to basic education. Accessibility requires (1) that people are not (unjustifiably) turned away; and (2) that appropriate steps are taken to make access easier for persons from groups that were either consigned to inferior institutions or excluded from certain educational institutions altogether.”¹⁷³

¹⁶⁵ Arendse (2011) *PELJ* 112.

¹⁶⁶ CESCR *General Comment No 11* (1999) para 7.

¹⁶⁷ *Juma Musjid* para 37.

¹⁶⁸ Tobin *The UN Convention on the Right of the Child* 1068.

¹⁶⁹ CESCR *General Comment No 13* (1999) para 6(b). See also Skelton (2013) *De Jure* 5.

¹⁷⁰ *Juma Musjid* para 43.

¹⁷¹ Malherbe “Educational rights” in *Child Law in South Africa* (2009) 402. See also Skelton (2013) *De Jure* 11.

¹⁷² Coomans “Content and scope of the right to education” in *Human rights in education* 3. See also Merabe *Core content* 133.

¹⁷³ Woolman & Fleisch *The Constitution in the classroom* (2009) 131, 132.

Furthermore, Coomans and Veriava defines accessibility as follows:

“It relates to education being available to all on the basis of the principle of non-discrimination, economic accessibility, as well as physical accessibility. In terms of the latter, where learners continue to walk distances of up to eight kilometres a day to get to school, whether the State is providing schools that are physical accessible, is questionable.”¹⁷⁴

According to the South African Human Rights Commission, accessibility means the following:

“The right to basic education being accessible refers to three overlapping dimensions. Firstly, no child can be denied access to education on the basis of discrimination. Secondly, educational institutions must be geographically accessible. This refers to both geographic distances that must be covered to access the school, as well as the physical safety of the learners when travelling to school. Thirdly, education must be economically accessible and affordable to all. International instruments specifically state that primary education should be free to all.”¹⁷⁵

This thesis will mainly focus on the economic accessibility of basic education, that is, that basic education must be provided free of charge.¹⁷⁶ Some strategies that have been suggested are the complete elimination of school fees and other indirect costs such as the cost of textbooks and school uniforms.¹⁷⁷ Furthermore, where learners are required to wear school uniforms, the State should provide for it, or at least to poor learners.¹⁷⁸ The CRC Committee is of the view that wearing a school uniform should not be compulsory, and that, especially vulnerable and disadvantaged learners, should not be excluded from accessing basic education due to the inability to afford an uniform.¹⁷⁹ Accordingly, the same argument can be made in relation to the cost of transport for learners who are unable to afford such costs.¹⁸⁰ Many families do not have to the necessary funds to afford the cost of schooling.¹⁸¹

3 3 6 Regional international instruments

Similar provisions can be found in regional international instruments. Article 11(1) of the African Charter on the Right and Welfare of the Child (“ACRWC”),¹⁸² which South

¹⁷⁴ Veriava & Coomans *The right to education’ socio-economic rights in South Africa* 67.

¹⁷⁵ Skelton (2013) *De Jure* 11,12. See also Merabe *Core content* 134.

¹⁷⁶ Articles 13 & 14 of the ICESCR, and article 28 of the CRC. See also Coomans (2009) *Erasmus Law Review* 437.

¹⁷⁷ Pranevicié B & Pūraitė A “Right to education in international documents” (2010) 3 *Jurisprudence* 133-156 at 140. See also Arendse (2011) *PELJ* 112.

¹⁷⁸ Sloth-Nielsen J & Mezmur BD *Free education is a right for me: A report on free and compulsory primary education* (2007) 16. See also Arendse (2011) *PELJ* 113.

¹⁷⁹ Arendse (2011) *PELJ* 113.

¹⁸⁰ Sloth-Nielsen & Mezmur *Free education* 16. See also Arendse (2011) *PELJ* 113.

¹⁸¹ Roithmayr (2003) *SAJHR* 398.

¹⁸² CAB/LEG/24.9/49 (1990).

Africa also signed and ratified,¹⁸³ states that “every child shall have the right to an education.” Moreover, article 11(2)(a) provides that education of the child shall be directed to “the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential.” Article 11(2)(d) states that education shall be directed to “the preparation of the child for a responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all people’s ethnic, tribal and religious groups.” Article 11(3) states that “State Parties shall take appropriate measures with a view of achieving the full realisation of the right to education.” Article 11(3)(d) states that State Parties must take appropriate measures to encourage regular school attendance and to reduce drop-out rates. Moreover, State Parties must “take special measures in respect of (...) disadvantaged learners to ensure equal access to education for all sections of the community.”¹⁸⁴ In addition, article 17(1) of the African Charter on Human Rights and People’s Rights,¹⁸⁵ provides that “every individual shall have the right to education.”¹⁸⁶

3 4 Concluding remarks

The right to a basic education unlocks the “enjoyment of other human rights and empowers [people] to play [an engaging] and meaningful role in society.”¹⁸⁷ Moreover, the State regards basic education as “the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults.”¹⁸⁸ International law prioritises basic education above other levels of education as State Parties are required to make it free and compulsory.¹⁸⁹ The next section will look at the obligations imposed on the State to realise the right to a basic education. This section will specifically focus on the duty on the State to provide economic access to basic education in public schools to reduce apartheid-inherited inequalities in the education system through the implementation of the quintile funding system.

¹⁸³ South Africa ratified the ACRWC in 2000.

¹⁸⁴ Article 11(3)(e) of the ACRWC.

¹⁸⁵ South Africa signed and ratified this Charter in 1996.

¹⁸⁶ 21 ILM 58 (1982).

¹⁸⁷ Arendse (2011) *PELJ* 101. See also Tomasevski K *Human rights obligations in education: The 4-A scheme* (2006) 47.

¹⁸⁸ Arendse (2011) *PELJ* 101.

¹⁸⁹ 101,104.

4 Duties imposed on the State

4.1 Constitutional duties

Section 29(1)(a) of the Constitution obligates the State to make education available and accessible to all learners.¹⁹⁰ Section 7(2) of the Constitution provides that the State must “respect, protect, promote and fulfil” the provisions in the Bill of Rights including the right to a basic education. This set of duties imposes positive and negative duties on the State to give full effect to the right to a basic education.¹⁹¹ The Constitutional Court in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (“*Ex parte Gauteng*”)¹⁹² stated that:

“[the right to basic education] creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”¹⁹³

The duty to protect, promote and fulfil are described as positive duties whereas the duty to respect is categorised as a negative duty.¹⁹⁴ The positive duty on the State is not described in terms of “reasonable legislative and other measures.” This means that the provision of basic education is not subject to a limitation like “reasonable legislative and other measures.”¹⁹⁵ Thus, the State is required to guarantee that every learner has access to educational facilities, and that every learner benefits from a basic education.¹⁹⁶ The negative obligation of the State requires the State not to interfere with an individual’s enjoyment and access to a basic education.¹⁹⁷ According to Bekker, the State’s obligation in terms of the right to a basic education can be formulated as follows:

“The implication is that not only should a person not be prevented from attaining an education, but furthermore, that the state should provide basic education. This means that the state has to make provisions for functional educational institutions. This would require

¹⁹⁰ As a socio-economic right, the State is under a constitutional obligation to make education available and accessible to all. See also Arendse *PELJ* (2011) 97; Arendse (2011) *LDD* 341,345; *Juma Musjid* para 45.

¹⁹¹ 1996 3 SA 165 (CC) para 9.

¹⁹² 1996 3 SA 165 (CC).

¹⁹³ *Ex parte Gauteng* para 9. Although this judgment related to the right to basic education, section 32 in the Interim Constitution, it is equally apposite to section 29(1)(a) of the Constitution due to similar drafting. See also Seleane (2003) *LDD* 142.

¹⁹⁴ *Grootboom* para 34.

¹⁹⁵ See section 3.1 above.

¹⁹⁶ Arendse (2011) *PELJ* 115. See also Chürr (2015) *PELJ* 2413; Boezaart T “A constitutional perspective on the rights of children with disabilities in an educational context” (2012) 27 *SAPL* 455-472 at 457; Chürr *A child’s right to a basic education* 133.

¹⁹⁷ Veriava & Coomans *The right to education* 61. See also Merabe *Core content* 58; Chürr (2015) *PELJ* 2413; Sloth-Nielsen & Mezmur *Free education* 16; Arendse (2011) *PELJ* 115; Boezaart (2012) *SAPL* 457.

the state to build schools, provide teaching materials and employ teachers. However, it goes further than merely making education physically available. The state has to ensure that educational institutions are open to everyone on the basis of non-discrimination. It has to see to it that the education being provided is affordable and of a high quality. Finally, it also has to see to it that the curriculum is flexible. In following the typification of General Comment 13, it would mean that basic education would have to be available, accessible, acceptable and adaptable.¹⁹⁸

Therefore, some of the most important obligations, for purposes of this thesis, imposed on the State includes, providing access to basic education for all learners, and to ensure that learners have effective access to educational facilities.¹⁹⁹ Furthermore, the duty to respect entails that the State must refrain from impairing access to this existing right to a basic education.²⁰⁰ Likewise, the State is required to prevent other parties from interfering with or hampering or diminishing the learner's right to access basic education.²⁰¹

The duty to protect requires the State to protect against any third-party interfering with the existing enjoyment of the right to a basic education.²⁰² Moreover, the State must maintain the ability of learners to gain access to basic education.²⁰³ The duty to promote obliges the State to "raise awareness of rights through educational programmes to bring rights and the methods of accessing and enforcing rights to the holder's attention and to promote the most effective use of existing access to rights."²⁰⁴ Hence, the State must support and promote participation in the education system and inform members of society of their right to a basic education.²⁰⁵ The duty to fulfil requires the State to adopt "appropriate legislative, administrative, budgetary, judicial, promotional and other measures"²⁰⁶ so that those who do not enjoy access to rights can gain access to it. Therefore, the State must take positive steps to ensure that those learners who lack access to basic education do gain access to a basic education.²⁰⁷

¹⁹⁸ Bekker "The right to education" in *A complication of essential documents* 7,8.

¹⁹⁹ Chürr (2015) *PELJ* 2413. See also De Groof J "Some comments and questions on dealing with education in the RSA on section 29 of the Constitution and the draft South African School Bill" in De Groof J & Bray E (eds) *Education under the new Constitution in South Africa* (1996) 55-104 at 63.

²⁰⁰ Juma *Musjid* para 53. See also Arendse (2011) *PELJ* 103.

²⁰¹ De Vos P & Freedman W *South African constitutional law in context* (2014) 671. See further Juma *Musjid* para 58; Chürr (2015) *PELJ* 2412; Woolman and Bishop "Education" in *CLOSA* 57-08.

²⁰² Chürr (2015) *PELJ* 2412.

²⁰³ De Vos & Freedman *Constitutional law* 671.

²⁰⁴ Liebenberg S "The interpretation of socio-economic rights" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *CLOSA* 2 ed (OS 2013) 33-01–33-66.

²⁰⁵ Chürr (2015) *PELJ* 2412.

²⁰⁶ De Vos & Freedman *Constitutional law* 672.

²⁰⁷ *Ex parte Gauteng* para 9. See also Arendse *PELJ* (2011) 103.

4 2 International obligations

4 2 1 *Language disparity in terms of the Constitution and international law discourse*

Section 26(1) and (2) of the UDHR obliges the State to provide free public education to learners. This provision fundamentally implies that each nation must establish a free public education system in order to provide the majority of learners with education.²⁰⁸ Additionally, article 13(2)(a) of the ICESCR, article 28(1)(a) of the CRC and article 11(3)(a) of the ACRWC calls for primary education to be free. Tobin suggests that accessibility means that education should be open to all, especially to the marginalised and vulnerable people in society.²⁰⁹ In light of this, one can argue that the drafters of the Constitution chose to include the words “basic education” and not “free primary education” in the Constitution as they did not want to limit the manner in which the State goes about ensuring a basic education for all.²¹⁰ While the Constitution makes it clear that international law must be considered for interpretation purposes, the departure by the language used in the Constitution from international law discourse must be respected.²¹¹ Woolman and Bishop notes that the obligation in terms of section 29(1)(a) of the Constitution is immediate, and the obligation in terms international law is progressively realisable.²¹² Furthermore, that the difference suggests that the Constitution prefers basic education to be available to all immediately, by whatever means, and that basic education should not be postponed in order to realise free education for all.²¹³ Accordingly, Woolman and Bishop argue that although the State has an obligation under international law to make primary education free for all learners, the international obligation does not automatically translate into a constitutional obligation to provide free primary education immediately.²¹⁴

4 2 2 *General international obligations*

Article 4 of the CRC imposes the following overarching duties upon the State:

²⁰⁸ Hodgson D “The international human right to education and education concerning human rights” (1996) 4 *International Journal of Children’s Rights* 237-262 at 241.

²⁰⁹ Tobin *The UN Convention on the Right of the Child* 1068.

²¹⁰ Woolman & Bishop “Education” in *CLoSA* 57-24. See also Fleisch B & Woolman S “On the Constitutionality of school fees: A reply to Roithmayr” (2004) 22 *Perspectives in Education* 111-123 at 111; Roithmayr (2003) *SAJHR* 396.

²¹¹ Woolman & Bishop “Education” in *CLoSA* 57-24, 57-25.

²¹² 57-25 n 92.

²¹³ 57-25 n 92.

²¹⁴ 57-24.

“State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources, and where needed, within the framework of international co-operation.”

Furthermore, article 2 of the ICESCR contains a similar provision to Article 4 of the CRC:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means including particularly the adoption of legislative measures.”

In addition, there are some general international obligations that the right to a basic education imposes on the State. These obligations include to respect, protect, and fulfil each of the key features namely, availability, accessibility, acceptability, and adaptability of the right to education.²¹⁵ These obligations are similar to the constitutional obligations described above. The obligation to respect requires the State to refrain from impairing or hindering access to the right to a basic education.²¹⁶ Furthermore, the obligation to protect requires the State to take steps to protect learners’ access to the right to a basic education. It also requires the State to enhance the ability of learners to access basic education, and not allow any interference by third parties.²¹⁷ Lastly, the obligation to fulfil means that the State must take positive and clear steps to ensure that all learners who do not have access to basic education must gain access to basic education.²¹⁸

4 2 3 International obligations in terms of economic accessibility

4 2 3 1 Introduction

In addition to the constitutional obligations and general international obligations described above, the State is also under certain specific international obligations imposed by conventions and treaties it signed and ratified, such as the ICESCR,²¹⁹ and the CRC.²²⁰ The main international law instruments recognise basic education

²¹⁵ CESCR *General Comment No 13* (1999) paras 46 & 50. See also Coomans (2009) *Erasmus Law Review* 427; Arendse (2011) *PELJ* 103.

²¹⁶ Brand D “Right to food” in Brand D & Heyns C (eds) in *Socio-economic rights in South Africa* (2005) 153-189 at 159. See also Arendse (2011) *PELJ* 103.

²¹⁷ Brand “Right to food” in *Socio-economic rights* 159. See also Arendse (2011) *PELJ* 103.

²¹⁸ Brand “Right to food” in *Socio-economic rights* 159. See also Arendse (2011) *PELJ* 103.

²¹⁹ South Africa signed the ICESCR on 3 October 1994 and ratified it on the 12th of January 2015.

²²⁰ South Africa signed the CRC convention in 1993 and ratified it on the 16th of June 1995.

above other levels of education as States are required to make it free and compulsory.²²¹ This section explores the specific obligation on the State to make basic education free.

4 2 3 2 Specific obligations imposed by international instruments

Section 13(2)(a) of the ICESCR requires State Parties to make primary education “compulsory and free to all.”²²² In this regard, the ICESCR has been described as the “most significant treaty” entrenching the right to education.²²³ The wording of article 13(2) of the ICESCR obligates State Parties to prioritise the introduction of free and compulsory primary education.²²⁴ Moreover, article 13(2)(e) of the ICESCR provides that all State Parties are obligated to ensure that an “educational fellowship system is in place to assist disadvantaged groups.”²²⁵ This provision reinforces the main responsibility of State Parties to ensure the direct provision of education.²²⁶ Section 28(1)(a) of the CRC also provides that State Parties are under an obligation to “make primary education compulsory and available free to all.” In this light, the CDESCR developed the concept of a “minimum core.” The minimum core strategy explains the core content of a right, and the corresponding minimum obligations imposed on the State Parties.²²⁷

The minimum core of the right has been described as “the essence of the right without which the right will lose its substantive significance as a human right.”²²⁸ It has been argued that the minimum core of the right to education under the ICESCR is compulsory and free education.²²⁹ Furthermore, Sloth-Nielsen argues that section 28(1)(a) of the CRC states the “core minimum ‘free and compulsory’ education at the primary stage...”²³⁰ Verheyde also submits “that the obligation to make primary

²²¹ Arendse (2011) *PELJ* 101.

²²² CDESCR *General Comment No 13* (1999) para 6. See further Liebenberg *Socio-economic rights* 243; Kamga SD “The right to a basic education” in Boezaart T (ed) *Child Law in South Africa* 517-533 at 518,519; Chürr (2015) *PELJ* 2414; Arendse (2011) *PELJ* 102; Veriava “Realising the right to basic education” in *Socio-economic rights* 86,87.

²²³ Arendse (2011) *PELJ* 101.

²²⁴ CDESCR *General Comment No 13* (1999) para 51. See also CDESCR *General Comment No 11* (1999) paras 6 & 7.

²²⁵ CDESCR *General Comment No 13* (1999) para 53.

²²⁶ Para 53.

²²⁷ Wesson M “Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court” (2004) 20 *SAJHR* 284-308 at 284. See further Arendse (2011) *PELJ* 109.

²²⁸ Arendse (2011) *PELJ* 109.

²²⁹ 109.

²³⁰ Sloth-Nielsen & Mezmur *Free education* 14.

education free and compulsory constitutes a minimum core obligation.”²³¹ These arguments are supported by the fact that the ICESCR regards basic education as so important that it imposes an immediate obligation on State Parties to realise the right, and it is reinforced by article 14 of the ICESCR.²³² Moreover, the Maastricht Guidelines states that the corresponding core obligations of the right to a basic education “should be fulfilled by all countries, including developing countries,” irrespective of the availability of resources.²³³ However, the CESCR does take “account of resource constraints applying within the country concerned”²³⁴ when assessing whether a State has complied with its minimum core obligations or not. Furthermore, the minimum core obligations of the right to a basic education may not be subjected to progressive realisation.²³⁵ This means that State Parties have to enforce these obligations immediately.²³⁶ Even if a State is not complying with its minimum core obligations, it is still under strict scrutiny to ensure that the right to a basic education is “at least prioritised above other rights which are subject to progressive realisation.”²³⁷ Moreover, the minimum core approach prioritises certain needs above others as “core” needs are more urgent.²³⁸ In education, such an approach would require that the State “devotes all the resources at its disposal first to satisfy its minimum core obligations in respect of disadvantaged learners before expending resources on relatively privileged groups.”²³⁹ It will later be argued that the South African State complies with this requirement as the State ensures economic accessibility by ensuring that disadvantaged learners are catered for first through the implementation of the quintile funding system.²⁴⁰

²³¹ Verheyde MA *Commentary on the United Nations Convention on the Rights of the Child: Article 28 The right to education* (2005) 55.

²³² CESCR *General Comment No 13* (1999) para 51.

²³³ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) reprinted in (1998) 20 *Human Rights Quarterly* 691-704 paras 9 & 10.

²³⁴ CESCR *General Comment No 3: The nature of State Parties' obligations (Art.2, para 1, of the Covenant)* E/1991/23 (1990) para 10.

²³⁵ Arendse (2011) *PELJ* 110.

²³⁶ CESCR *General Comment No 3* (1990) lists the right to primary education as a right “capable of immediate application,” the CESCR in *General Comment No 11* (1999) para 10 provides the “the plan of action [which states are required to adopt in terms of article 14 of the ICESCR] must be aimed at securing the progressive implementation of the right to compulsory primary education...”

²³⁷ Arendse (2011) *PELJ* 110.

²³⁸ Arendse (2011) *PELJ* 110. See also Wesson (2004) *SAJHR* 284.

²³⁹ Arendse (2011) *PELJ* 110. See also Roux T “Understanding *Grootboom* – A response to Cass R Sustein” (2002) 12 *Constitutional Forum* 41-49 at 41,47.

²⁴⁰ See section 3.3 in Chapter 5.

Henceforth, the realisation of the right to a basic education in terms of international law demands that the State to make an effort to make education available and accessible.²⁴¹ This implies positive obligations on the State.²⁴² In this light, the international law obligations imposed on the State is also tied to two of the essential elements of the 4-A scheme, namely availability and accessibility for purposes of this thesis. The first overarching obligation on the State is to ensure the availability of free primary education.²⁴³ Availability echoes the positive obligation on the State to provide basic education and to make it available to all in order to meet the needs of the learners.²⁴⁴ Availability can be interpreted to oblige the State to provide free basic education, which in turn obligates the State to provide the crucial resources to schools.²⁴⁵ Tomasevski submits that availability imposes two different governmental obligations on State Parties.²⁴⁶ Firstly, “the right to education as a civil and political right” that requires the government to permit the establishment of schools by non-state actors.²⁴⁷ Secondly, the right to education as a socio-economic right that requires the State to establish, and fund schools to make sure it is available to all learners.²⁴⁸

In terms of accessibility, the CESCR emphasises that the scope of free primary education stretches beyond the prohibition on the charging of school fees.²⁴⁹ This means that parents or guardians are exempted from other direct costs such as learning materials, textbooks and basic school equipment. The CRC Committee is also in agreement with the CESCR. The CRC Committee further submits that direct costs, such as the supply of books and learning materials, and the maintenance of school structures, is the responsibility of the State and should be provided free of charge.²⁵⁰ Accordingly, the indirect costs of schooling also falls under the scope of free primary education. The CRC Committee further notes that where school regulations mandate the wearing of school uniforms, the State is under an obligation to provide the uniforms, at least to poor children first.²⁵¹ The same applies to transport costs,

²⁴¹ Coomans F “Exploring the normative content of the right to education as a human right: Recent approaches” (2004) 50 *Persona y Derecho* 61-100 at 64.

²⁴² 64.

²⁴³ Arendse (2011) *PELJ* 111.

²⁴⁴ Chürr (2015) *PELJ* 2414.

²⁴⁵ Khumalo *Some implications* 81.

²⁴⁶ Tomasevski *Human rights obligations* 13.

²⁴⁷ 13.

²⁴⁸ 13.

²⁴⁹ Arendse (2011) *PELJ* 112.

²⁵⁰ Arendse (2011) *PELJ* 112. See also Sloth-Nielsen & Mezmur *Free education* 16.

²⁵¹ Arendse (2011) *PELJ* 112,113. See also Sloth-Nielsen & Mezmur *Free education* 16.

according to the Committee. It stated that there is an obligation on the State to subsidise transport costs where the learner cannot afford such costs.²⁵² The right to enjoy socio-economic rights on an equal basis creates an immediate obligation on State Parties.²⁵³ This is confirmed by General Comment No 13 and the CRC as State Parties are immediately obligated to ensure that the right to education will be “exercised without discrimination of any kind.”²⁵⁴ Moreover, these obligations have been identified as part of the core content of the right to a basic education.²⁵⁵ In essence this means that that State Parties are obligated to meet these obligations immediately, irrespective of its economic development.²⁵⁶ The State is also under an immediate obligation to remove any obstruction which may cause discrimination where a learner is not able to afford the cost of schooling and the related direct and indirect costs.²⁵⁷ In the South African context, all of the obligations discussed above applies as the ICESCR and the CRC has been signed and ratified. This means that at international law, the South African government has an immediate obligation to investigate any practices that might give right to possible discrimination, and implement policies to address it.²⁵⁸ In light of this and the focus of the thesis, it is important to point out that it will be argued later that the government has made strides to address the funding inequalities in public schools through the implementation of the quintile funding system.

4 2 3 3 Concluding remarks

Therefore, at international law, the minimum core obligations for the right to a basic education can be drawn from the concepts of free and compulsory primary education.²⁵⁹ This section aimed to illustrate that the provision of free education is one of the core obligations in terms of the right to a basic education. No one can be denied economic access to basic education due to an inability to pay for public schooling. It is important to point out that at an international level, the State is obligated to provide

²⁵² Sloth-Nielsen & Mezmur *Free education* 16.

²⁵³ CESCR *General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art.3 of the Covenant)* E/C.12/2005/4 (2005) para 16.

²⁵⁴ CESCR *General Comment No 13* (1999) para 43. See also Sloth-Nielsen & Mezmur *Free education* 15.

²⁵⁵ Arendse (2011) *PELJ* 113.

²⁵⁶ Verheyde *A commentary* 57. See also Arendse (2011) *PELJ* 113.

²⁵⁷ Arendse (2011) *PELJ* 113.

²⁵⁸ 120.

²⁵⁹ Arendse (2011) *PELJ* 111. See also Verheyde *A commentary* 55.

free education to all learners, and where it is not possible to do so, to at least provide so to poor learners first.²⁶⁰

5 Conclusion

Education is vital to human development and improving one's quality of life. South Africa has come a long way in recognising basic education as a fundamental human right. The importance of it is emphasised in section 29(1)(a) of the Constitution as the right to a basic education does not have the same textual qualifiers as other socio-economic rights such as the right of access to housing.²⁶¹ Therefore, the nature of the right to a basic education is distinguishable from other socio-economic rights in the Bill of Rights. It is not subject to the availability of resources, it an immediate and direct right. Education is a vital tool that assists marginalised and vulnerable beneficiaries thereof the breakout of the poverty cycle and rise above. This chapter set out the transformative role of the Constitution in terms of education, the interpretation of the right to a basic education, in terms of the Constitution and in terms of international and regional international law, and the obligations imposed on the State in order to realise the right to a basic education. This chapter also explored the constitutional obligations in terms of section 7(2) and section 29(1)(a) of the Constitution. Moreover, this section explored the international obligations imposed on the State. It was important to explore these obligations as the quintile funding system aims to redress past funding injustices. In this light, it was vital to determine the State's obligations in providing economic access to basic education in public schools as funding injustices was one of the main characteristics during the apartheid era. It is important to note that the realisation of access to basic education is not possible without proper funding from the State. In doing so, the State has implemented a pro-poor funding model to address the inequalities in the funding of basic education. The next chapter will look at this funding model, namely the quintile funding system.

²⁶⁰ Roux (2002) Constitutional Forum 41, 47. See also Arendse (2011) *PELJ* 110.

²⁶¹ See section 3 1 above.

Chapter 4: The quintile funding system

1 Introduction

Since the 1994 elections, the focus has been on the redressing of past inequalities in the education system of South Africa. The government has implemented a programme of reforming the education system based on equity, human rights, and democracy.¹ Since 1994, the government has implemented a range of laws and policies to ensure that public funding is aimed at redressing the disparity in funding of public schools, and to ensure that the learner's right to a basic education is realised.² The aim of the government is to redress past inequalities in the funding of basic education, which seemingly goes hand in hand with the transformative role of the Constitution in society.³ The transformative aims of the Constitution brought in a new era in which everyone is entitled to equal opportunities, including the provision of basic education to all learners.⁴

In South Africa, basic education in public schools is funded by the government through a pro-poor funding model, called the quintile funding system. The quintile funding system was introduced as part of the National Norms and Standards of School Funding policy, as amended, ("NNSSF policy"),⁵ in order to improve the equity of school funding in the education system. The lack of financial support can be an economic barrier to access basic education in South Africa, especially where the majority of learners live in poverty. As previously discussed in chapter 3,⁶ the right to a basic education is immediately realisable and is not dependant on the availability of government resources.⁷ This obligates the government to provide access to basic education immediately. The government must make basic education accessible which means that education in public schools must be free, or at least affordable to all learners.⁸ Ideally, the right to a basic education was intended to mean that all learners

¹ Ramdass K *The challenges facing education in South Africa* (2009) 111.

² Section 29(1)(a) of the Constitution.

³ See section 2 2 in Chapter 3 for a discussion on the transformative nature of the Constitution.

⁴ Arendse (2011) *LDD* 356.

⁵ Department of Education *South African Schools Act, 1996 (Act No 84 of 1996): Amended National Norms and Standard for School Funding* GN 869 in GG 29179 of 31 August 2006 ("Amended NNSSF").

⁶ See section 3 1 in chapter 3.

⁷ Arendse (2020) *AHRLJ* 288,313. See also *Juma Musjid* para 37; Berger (2003) *Col LR* 625; Simbo (2013) *LDD* 488; Boezaart (2012) *SAPL* 457; Skelton (2013) *De Jure* 3; Veriava & Skelton (2019) *SAJHR* 3.

⁸ Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* (2017) 144.

would have access to free basic education, and that would be the government's duty to realise the right.⁹ However, in reality, the government had to recognise that it has to cater for the majority of poor learners from poor areas first.¹⁰ In doing so, the government developed the quintile funding system that provides for the cross-subsidisation of school fees.¹¹ Cross-subsidisation means that the government pays less money to a school that is in an affluent position to raise money itself, through school fees, or any other funding mechanism.¹²

This chapter will set out the legal framework in South Africa providing for the funding of public schooling and explain how State funding of public schools operate. Furthermore, this chapter aims to explain how school funding works through the quintile funding system in order to guarantee economic access to schooling for poor learners. This chapter will also explore the determination of quintile rankings, how the quintile funding system functions and how much funding is distributed to learners from different quintile schools. Moreover, the State has also made strides in guaranteeing poor learners' economic access to basic education in fee-charging schools. This chapter will also explore another measure put in place by the State to provide affordable schooling to poor learners in fee-charging schools, called school-fee exemptions.

2 Legal framework providing for funding of public schools

2 1 Introduction

In South Africa, the funding of public schools is generally governed by the Constitution, legislation, and policy documents. The South African Schools Act 84 of 1996 ("SASA") along with the Educational White Papers and the NNSSF policy regulate the funding of public schools. This section will set out the relevant provisions governing funding in public schools.

2 2 Constitution

The Constitution requires that the funding of basic education must provide universal access to all learners in South Africa as section 29(1)(a) of the Constitution makes

⁹ 144.

¹⁰ 144.

¹¹ 144.

¹² 144.

provision for “everyone” to claim this right. This means that no one may be denied a basic education.¹³ In this light, basic education must be economically accessible as no one may be refused to attend a public school due to an inability to pay school fees or to pay for learning materials.¹⁴ Moreover, the Constitution requires the State to provide public schools with sufficient levels of quality resources throughout the basic education system.¹⁵ The Constitution further requires that the funding of basic education must provide substantive equality and redress in the basic education system as education must be made available and accessible to all learners.¹⁶ It requires that a progressive funding model be implemented to ensure that all public schools have sufficient resources to provide basic education. The main objective of the progressive model, namely, the quintile funding system, is to provide more funding and resources to previously disadvantaged schools in order to redress past funding imbalances.¹⁷

2 3 SASA

SASA was one of the key pieces of legislation that was introduced to transform the education system. In *MEC for Education v Governing Body v Rivonia Primary*,¹⁸ the Constitutional Court stated that “the primary purpose of the Schools Act is to provide for the organisation, governance and funding of schools and to give effect to the constitutional right to education.”¹⁹ Moreover, SASA also aims to promote access, quality and democratic governance in schools. The preamble of SASA,²⁰ makes it clear that all learners have access to equal opportunities in education irrespective of their economic, social, religious, ethnic, gender or cultural backgrounds. SASA attempts to alleviate the financial burden of school fees on parents who are unable to afford school fees or associated secondary costs in two ways. Firstly, it provides the framework to determine if a public school can charge school fees or not.²¹ Secondly,

¹³ McLaren D “Funding basic education” in Veriava F, Thom A & Hodgson TF (eds) *Basic Education Rights Handbook* (2017) 37-73 at 40.

¹⁴ Praneviciė & Pūraitė (2010) *Jurisprudence* 140. See also McLaren “Funding” in *Basic Education Rights Handbook* 40.

¹⁵ McLaren “Funding” in *Basic Education Rights Handbook* 40.

¹⁶ 40.

¹⁷ 40.

¹⁸ 2013 6 SA 582 (CC).

¹⁹ 2013 6 SA 582 (CC) para 53. See also *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 55.

²⁰ See section 2 3 in chapter 3 for quotation.

²¹ Section 39 of SASA. Furthermore, see section 4 2 & 4 3 3 below for a discussion on section 39 of SASA.

it allows parents who are unable to pay school fees to apply for school fee exemptions at fee-charging schools.²²

Chapter 4 of SASA specifically regulates the funding of public schools. Section 34(1) of SASA provides that “the State must fund public schools from public revenue on an equitable basis.” The rationale for this is to ensure that the right to a basic education is realised.²³ Furthermore, the equitable basis for the distribution of funding aims to redress past funding inequalities in the basic education system.²⁴ During the apartheid era, White schools received 20 times more funding per learner than the poorest Black schools.²⁵ In 1994, the State’s annual per capita expenditure for learners from the most favourable schools was R5403 compared to R1053 for learners from the least favourable schools in the Transkei.²⁶ Moreover, section 35 of SASA refers to the NNSSF policy which, subject to the Constitution and SASA, must deal with public funding of schools in terms of section 35, and the exemption of parents and guardian who are not in a position to pay school fees. Section 35 states that:

“subject to the Constitution and this Act, the minister must determine norms and minimum standards for the funding of public schools after consultation with the Council of Education Ministers, the Financial and Fiscal Commission and the Minister of Finance.”

Section 39(4) provides that the “Minister must, after consultation with the Council of Education Ministers and the Minister of Finance make regulations regarding the equitable criteria and procedures referred to in subsection (2)(b).”²⁷ In addition to the funding provisions in SASA, the NNSSF policy contains detailed regulations on how public schools must be funded. The NNSSF policy further deals with procedures to be adopted by the Provincial Education Departments (“PED” or “PEDs”) regarding resource allocations to schools within its jurisdiction.²⁸ Chapter 4 of SASA also deals with the responsibilities of the School Governing Body (“SGB”) towards the funding for

²² Veriava F *The resourcing of public schools: An analysis of compliance with, and measures of the State’s constitutional obligations* Research Paper for the Studies in Poverty and Inequality Institute (2010) 26,27.

²³ Khumalo *Some implications* 12,13.

²⁴ 12,13.

²⁵ Mestry R “A critical analysis of the National Norms and Standards for School Funding policy: Implications for social justice and equity in South Africa” (2014) 42 *Educational Management Administration & Leadership* 851-867 at 852. See further section 4.2 in Chapter 2 for a discussion on the funding of schools during the apartheid-era.

²⁶ Mestry (2014) *Educational Management Administration & Leadership* 852. See also Patel F “Putting our money where our mouth lies – norms and standards for public school funding” in *International Conference on Education and Decentralisation* (2002) 175.

²⁷ Section 39(2)(b) of SASA provides “...equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.”

²⁸ Cornerstone economic research *Processes for financing public education in South Africa* (2017) 11.

public schools.²⁹ Section 37 of SASA provides an outline for the requirements for the management of the assets and funds of schools. It states that each individual school must have a fund, and all proceeds thereof are used specifically for that school.

Chapter 4 of SASA is of vital importance for purposes of this thesis as it sets out important regulations and rules for the funding of public schools. In addition to SASA, other policy documents have also been published to provide a detailed framework for the funding of public schools. The NNSSF policy is discussed below.

2.4 NNSSF policy

The NNSSF policy (as amended)³⁰ was founded in SASA and became national policy in 1999, but only effected in 2000. An amended version came into effect in 2007. In an attempt to dismantle the unfair and unequal funding of public schools based on race and ethnicity, the democratic government implemented the NNSSF policy to assist transformation in the education system.³¹ Hence, the ultimate objective of the NNSSF policy is to redress the gap between poor and rich schools and to improve access to free education for poor learners.³² The NNSSF policy states that: “These norms and standards deal with the funding of public schools in terms of section 35 of SASA, the exemption of parents who are unable to pay school fees in terms of section 39(4) of [SASA], and public subsidies to independent schools in terms of section 48(1) of [SASA].”³³ Furthermore, the norms also deal with the distinction between personnel and non-personnel funding. More specifically, it deals with the criteria and procedures to be adopted by PEDs in order to determine the resource allocations for schools, in order to progressively target the poorest schools.³⁴ Thus, at the core of this funding policy is a strategy for funding that favours poor schools and previously disadvantaged learners. Henceforth, the pro-poor funding policies include certain important policies to give effect to the main aims of redress and equity. This includes pro-poor targeting for recurrent, non-personnel expenditure, the introduction of no fee schools, and the

²⁹ Section 42 of SASA requires the SGB to keep record of funds received and spent by the school, and of its assets, liabilities and financial transactions. Furthermore, the SGB is required to draw up financial statements in accordance as soon as it is practicable but not later than three months after the financial year end.

³⁰ When reference is made to the NNSSF policy it only refers to the Amended NNSSF policy gazetted in 2006 unless otherwise stated.

³¹ Mestry (2014) *Educational Management Administration & Leadership* 852.

³² *Amended NNSSF* paras 28 & 153.

³³ *Amended NNSSF* paras 3(b) & (c).

³⁴ Para 1.

“retention of a system of charging school fees as part of government’s commitment to pro-poor cross subsidies.”³⁵ This policy will be referenced to and discussed in detail later in this chapter.³⁶

2 5 Education White Papers

The 1995 White Paper on Education and Training (“White Paper 1”) acknowledges that basic education is a legal entitlement which every person can claim.³⁷ It further highlights the problems with spending inequalities in the past regime and recognises the need to rectify the inequalities.³⁸ White Paper 1 directs the State to “redress educational inequalities among those of our people who suffered particular disadvantages.”³⁹ It sets out two important policy plans for the school system. It discusses the organisation, governance, and funding of schools, and secondly, it discusses the approach to the “provision of free and compulsory general education.”⁴⁰

White Paper 2 on the Organisation, Governance and Funding of schools (“White Paper 2”)⁴¹ sets out how a public school should be governed, organised, and funded. It states that there should be a partnership between a public school and the provincial education department, and the community.⁴² These connections play a vital role in reconciling the responsibilities of the State and the community through education. It is the basis for restructuring the basic education system.⁴³ White Paper 2 sets out certain common features that all public schools must have. It includes that public schools must be funded totally or largely from public resources to realise the right to a basic education effectively.

2 6 Concluding remarks

It is clear from the above legislative framework that the main aim is to redress the funding inequalities brought forward by the legacy of apartheid. In order to do so, it is necessary to explore the funding of public schools by the State in order to alleviate the

³⁵ Mestry (2014) *Educational Management Administration & Leadership* 856.

³⁶ See section 3 below.

³⁷ *White Paper 1* Chapter 7, para 11.

³⁸ Chapter 4, para 7.

³⁹ Chapter 4, para 7.

⁴⁰ Chapter 1, para 1.

⁴¹ Department of Education *Education White Paper 2: Organisation, Governance and Funding of schools* GN 130 of 1996.

⁴² Para 2.7.

⁴³ Para 2.7.

financial burden on poor and disadvantaged parents pertaining to the cost of schooling. The next section will explore the State funding of public schools.

3 State funding of public schools

Once the Department of Basic Education (“DBE”) receives its allocation from South Africa’s National Budget, it apportions its budget to each province.⁴⁴ Each province then develops its own education budget which mainly consists of three categories.⁴⁵ The first category of state funding is directed to the infrastructure of schools. The NNSSF policy requires that each provincial budget for infrastructure in their overall budget. Most previously disadvantaged schools are in dire physical conditions. Hence, each province almost exclusively allocates funds for infrastructure maintenance of poor schools.⁴⁶ The neediness of the school is broadly determined based on factors such as the lack of schools in particular areas and overcrowding of schools.⁴⁷ As more funds for infrastructure are directed to poor schools, it can be argued that the allocation of infrastructure funds is directed at redressing past inequalities in the basic education system.

The second category is personnel expenditure, that is, teacher’s salaries. The NNSSF policy does not directly deal with personnel costs in PEDs, however, it does set out certain policy targets for schools. It includes that “schools must be supplied with an adequate number of educator and non-educator personnel.”⁴⁸ Furthermore, that such staff must be equitably distributed in accordance with the educational requirements of the school.⁴⁹ Lastly, that the costs of personnel establishments must be viable within the provincial budget.⁵⁰ The bulk of State funding is spent on teachers’ salaries. The exact amount of which is determined by the qualifications and experience

⁴⁴ Tito Mboweni, Minister of Finance, announced on Wednesday, 26 February 2020 that the basic education budget for 2019/2020 is R 262.5 billion. It is set to rise by 3.8% a year over the medium term.

⁴⁵ Arendse (2011) LDD 348. See also *National survey on barriers of access to education in South Africa: Baseline review and conceptual framework document (“Barriers survey”)* (2006) 25; Franklin & McLaren *Realising the right to basic education in South Africa* 96; Veriava *The resourcing of public schools* 23.

⁴⁶ Arendse (2011) LDD 349. See also *Barriers survey* (2006) 25.

⁴⁷ Veriava *Realising the right to basic education* 37.

⁴⁸ *Amended NNSSF* para 20(a). See further Mestry et al “State funding in selected African countries” in *Re-thinking Postcolonial Education in Sub-Saharan Africa* 164; Bisschoff T & Mestry R *Financial school management explained* (2009) 44.

⁴⁹ *Amended NNSSF* para 20(b). See further Bisschoff & Mestry *Financial school management explained* 44.

⁵⁰ *Amended NNSSF* para 20(c). See further Bisschoff & Mestry *Financial school management explained* 44.

of a teacher.⁵¹ The Minister of Education has determined that personnel to non-personnel funding in ordinary public schools should satisfy an 80/20 ratio.⁵²

The last category is non-personnel, non-capital expenditure (“NPNC”), also known as “school allocation” money.⁵³ The NNSSF policy was implemented to regulate non-personnel funding as this expenditure has been described as a vital tool to support the State’s commitment in fulfilling its constitutional obligation to provide free education to all learners.⁵⁴ Mestry and Veriava respectively acknowledges that actual non-personnel expenditure only constitutes 8-10% of school budgets.⁵⁵ This expenditure constitutes a relatively small share of the State’s expenditure on basic education.⁵⁶ Mestry states that schools that have a “dire need for additional resources [...] are unable to utilise those funds for such purposes.”⁵⁷ On the other side, schools that derive income from school fees have the capacity to spend this income according to the school’s needs.⁵⁸ This point to the fact that schools and SGBs have unequal capacity to spend money.⁵⁹ It is acknowledged that an exceedingly small portion of the budget is allocated to redress the funding disparities of the past. However, this study submits that 2 out of the 3 big budget items are directed towards redressing past funding inequalities in the education system of South Africa, namely, the funding for infrastructure and the NPNC expenditure funding, as more funding is directed to poor schools first.

This expenditure is directed at the acquiring of capital equipment and consumables required for teaching in schools. This category includes electricity, water, cleaning products, stationary, computers, furniture, photocopiers, and teaching aids, such as textbooks.⁶⁰ Furthermore, the Draft National Policy for Provision and Management of

⁵¹ Arendse (2011) *LDD* 348. See also *Barriers survey* (2006) 25; Veriava *The resourcing of public schools* 25.

⁵² *Amended NNSSF* para 21.

⁵³ Arendse (2011) *LDD* 349. See also *Barriers survey* (2006) 25,26.

⁵⁴ *Amended NNSSF* para 88. See further Veriava *Realising the right to basic education* 39.

⁵⁵ Essentially, this means that a very small portion of the basic education resource allocation is aimed at redress. See Mestry R “A critical analysis of legislation on the financial management of public schools: A South African perspective” (2013) 46 *De Jure* 162-177 at 171; Veriava (2007) *AHRLJ* 182.

⁵⁶ Veriava *Realising the right to basic education* 39.

⁵⁷ Mestry (2014) *Educational Management Administration & Leadership* 856.

⁵⁸ 856.

⁵⁹ 857.

⁶⁰ *Amended NNSSF* paras 88 & 96(i)-(vi). See further Arendse (2011) *LDD* 349; *Barriers survey* (2006) 26; Franklin & McLaren *Realising the right to basic education in South Africa* 96.

Learning and Teaching Support Material (“LTSM”)⁶¹ broadly defines LTSM to “include stationary and supplies, learning materials, stationary, workbooks, teaching aids, and science, technology, mathematics and science apparatus.”⁶² The school allocation funds also includes non-LTSM items such as desks, chairs, telephone sets, fax machines, first aid kits, hardware tools, intercom systems, and so forth.⁶³ Schools pay for these essential goods from their NPNC expenditure allocation money and from the money generated by charging school fees,⁶⁴ and organising fundraising activities.⁶⁵ It is important to note that the school allocation funds may not be used to cover the costs of personnel or new buildings.⁶⁶

The NPNC expenditure is allocated by ranking public schools from the poorest to the least poor.⁶⁷ Thus, NPNC expenditure is funded to public schools according to the school’s quintile poverty ranking.⁶⁸ Accordingly, the NNSSF policy provides greater levels of non-personnel funding to public schools serving poor communities,⁶⁹ that is, quintile 1 to 3 schools. In order to understand the ranking of schools according to its quintile poverty ranking and allocating NPNC expenditure funding to public school, it is necessary to discuss the quintile funding system implemented by the State to regulate funding of public schools. The next section will look at the rationale for the implementation of the quintile funding system, how the system functions, and how funding allocations are determined and distributed to public schools.

⁶¹ Department of Basic Education *The Draft National Policy for Provision and Management of Learning and Teaching Support Material* (2014) available at <https://www.education.gov.za/Resources/Policies.aspx>.

⁶² *Amended NNSSF* para 96(i). See also Veriava *Realising the right to basic education* 40; Veriava F “Basic Education Provisioning” in Veriava F, Thom A & Hodgson TF (eds) *Basic Education Rights Handbook* (2017) 218-235 at 228; Paterson (2018) *SAJHR* 113; Department of Basic Education *The Draft National Policy for Provision and Management of Learning and Teaching Support Material* (2014) available at <https://www.education.gov.za/Resources/Policies.aspx>.

⁶³ *Amended NNSSF* para 96(ii).

⁶⁴ Section 39 of SASA provides that school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the annual budget meeting of the school. See Arendse (2011) *LDD* 349; *Barriers survey* (2006) 25.

⁶⁵ *Barriers survey* (2006) 26.

⁶⁶ *Amended NNSSF* para 99.

⁶⁷ According to Veriava, 80% of funds for non-personnel expenditure are directed to 60% of the poorest schools, that is, quintile 1 to 3 schools. See Veriava *Realising the right to basic education* 39. See also Veriava *The resourcing of public schools* 26.

⁶⁸ Veriava F & Wilson S “A critique of the proposed amendment on school funding and school fees” (2006) 6 *ESR Review* 9-13 at 10. See further Franklin & McLaren *Realising the right to basic education in South Africa* 96.

⁶⁹ McLaren “Funding” in *Basic Education Rights Handbook* 65.

4 The quintile funding system

4.1 Introduction

The State has an important aim to overcome the legacies of the past by equalising resource allocations and ensuring that all learners have economic access to basic education in public schools, as White Paper 1 promises to “open the doors of learning and culture to all.”⁷⁰ Furthermore, the policy guidelines adopted at the 1992 National Conference of the ANC committed the ANC government-in-waiting to “equalise the per capita expenditure between black and white education” and ensuring that “resources are redistributed to the most disadvantaged sectors of our society.”⁷¹ In 2005, the Education Laws Amendment Act 24 of 2005 (“Education Amendment Act”) amended SASA in two major ways. The introduction of the Education Amendment Act reformed the established quintile funding system by introducing free schooling in quintiles 1 to 3.⁷² The main aim behind this reform was to improve the quality of education received in the country’s poorest schools. The other major reform that the Education Amendment Act introduced was the reform of the fee-exemption policy in fee-charging schools, namely, quintile 4 and 5 schools. The rationale for this reform was to assist access to schooling for the poorest learners in fee-charging schools.

The quintile funding system is a redistributive strategy of the State’s resources whereby public schools are categorised by factors such as the school’s social and economic disadvantage, poverty levels and the school’s geographical location.⁷³ In terms of section 39(7) of SASA, the Minister, by way of a notice in the Government Gazette, must annually determine the national quintiles for public schools. This must be used by the Provincial Minister of the Executive Council for Education to identify public schools that may not charge school fees.

4.2 Determination of the fee-status of a public school

The Education Amendment Act mandates the “Minister of Education to determine quintile norms and minimum standards for the funding of public schools.”⁷⁴ In order to determine the fee status of a school, the Minister of Basic Education publishes a

⁷⁰ 38.

⁷¹ 38.

⁷² McLaren “Funding” in *Basic Education Rights Handbook* 56.

⁷³ McLaren “Funding” in *Basic Education Rights Handbook* 65. See also Ogbonnaya U & Awuah FK “Quintile ranking of schools in South Africa and learners’ achievement in probability” (2019) 2 *Statistics Education Research Journal* 106-119 at 106; Khumalo *Some implications* 2.

⁷⁴ Mestry (2014) *Educational Management Administration & Leadership* 859.

national poverty distribution table each year that determines the poverty status of each province.⁷⁵ The PEDs must maintain a “resource targeting list” as a basis for the pro-poor distribution of the budget for school allocations.⁷⁶ This list is organised from the poorest to the least poor schools.⁷⁷ The PED must then allocate each school a poverty score that will allow the school to be classified from the poorest (quintile 1) to the least poor (quintile 5).⁷⁸ In doing so, poorer communities are best served by the schools closest to them.⁷⁹ The Department of Basic Education’s (“DBE”) target was for the national poverty distribution to have 20% of learners in each quintile.⁸⁰ To determine the school poverty score (“poverty score” or “score”), certain principles governing the determination of the score must be taken into account.

The first principle that must be taken into account is that “the score should be based on the relative poverty of the community around the school, which in turn should depend on individual or household advantage or disadvantage with regard to income, wealth and/or the level of education.”⁸¹ Furthermore, that the score should be based on data collected from the national Census conducted by StatsSA, or any other equivalent set that could be used to determine the score.⁸² Moreover, the “derivation and calculation of the poverty score should be sufficiently comprehensive to provide a reasonable measure of the relative poverty of a school community.”⁸³ It is important to note that the score must be transparent and generally understandable where possible. The last principle to take into account is the basic methodology behind the score. Accordingly, the methodology behind the score is to promote the pro-poor funding model that treats equally poor schools the same, regardless of the province the school is located in.⁸⁴

To determine the school’s poverty scores, there are a few steps that must be followed. In the first step, “each school must be linked to a specific geographical area

⁷⁵ Cornerstone *Processes for financing* 40.

⁷⁶ 40.

⁷⁷ 40.

⁷⁸ *Amended NNSSF* para 100. See further Cornerstone *Processes for financing* 40.

⁷⁹ *Amended NNSSF* para 100.

⁸⁰ NCOP Education and Technology, Sports, Arts and Culture meeting on “NSFAS on 2018 state of readiness; DEB quintile system; With minister” (29 November 2017) available at: <https://pmg.org.za/committee-meeting/25629/> accessed 21-05-2020.

⁸¹ *Amended NNSSF* para 101(a).

⁸² Para 101(b).

⁸³ Para 101(c).

⁸⁴ Para 101(d).

that can be considered the catchment area of the school.”⁸⁵ If the national Census data is used, the geographical area would be areas or the place names closest to the school.⁸⁶ The second step is to determine the variables from the data set relating to households and individuals. These variables must be informed by three difference indicators of poverty, that is, income, dependency ratio (or the unemployment rate), and the level of education (or literacy level) in the community.⁸⁷ The third and final step is to determine the variables from the data set, and the indicators of poverty, must be weighted in order to determine the final poverty score for each geographical area, corresponding to each school.⁸⁸ Thus, the NNSF policy makes it clear how the score is determined in order to rank public schools.

Conversely, not everyone agrees with the manner in which schools are classified. Some unions do not agree with the manner in which schools are classified. The National Union of Public Service and Allied Workers (“NUPSAW”) argues that the manner in which schools are classified is unscientific.⁸⁹ NUPSAW reasoned that no *in loco* inspections were done at schools in order to determine the poverty level of the school community or the school infrastructure. Moreover, NUPSAW argues that that placement of schools in a quintile is purely dictated by economics. NUPSAW reasoned that the fewer schools classified in quintile 1, 2 and 3, the less money the State has to disburse.⁹⁰ Similarly, Bisschoff and Mestry state that only the poorest were targeted but those schools in the middle become neglected and impoverished.⁹¹ However, Bush & Heystek note that:

“This approach is justifiable to address historic inequalities, but it also increases pressure on the SGBs of the schools in quintile 4 and 5 to replace the lost income through fees or other fundraising activities. The outcome is substantial variations in fee levels at different schools, making it more difficult to achieve the goals of equity. The richer schools are able to protect their privileged position through high fees while the positive discrimination in state funding cannot compensate for the substantial differences in fee levels.”⁹²

⁸⁵ Para 102(a).

⁸⁶ Para 102(a).

⁸⁷ Para 102(b).

⁸⁸ Para 102(c). It is important to note that the Department of Education will determine the weightings that should be used.

⁸⁹ NUPSAW “The quintile system”: A scientific way of organizing schools into meaningful groups” (2002) *The Education Journal* 7.

⁹⁰ 8.

⁹¹ Bisschoff & Mestry *Financial school management* 49.

⁹² Bush T & Heystek J “School governance in the new South Africa” (2003) 33 *Compare: A Journal of Comparative and International Education* 127-138 at 130.

It is clear from the above that wealthier schools are able to protect its privileged position in society, whereas poorer schools cannot do the same. Moreover, a vital assumption underlying the NNSSF policy is that the national and provincial levels of government will honour the State's duty to provide learners with a basic education and to safeguard the right as provided in the Constitution. Therefore, in order to effect redress, the public financing of schools must specifically target the needs of the poorest learners in the country.

4 3 The functioning of the quintile funding system

4 3 1 Introduction

Concerns have been raised that the implementation of the policy that allow learners access to no-fee schools does not go far enough in terms of ensuring that these schools are sufficiently funded through means other than the collection of school fees.⁹³ In this light, SASA was amended to provide a system to establish norms and standards for the funding of schools by means of the quintile funding system. These norms and standards seek to categorise schools according to their poverty ranking.⁹⁴ The quintiles are ranked from 1 to 5, that is, the poorest to the least poor schools.⁹⁵ The poverty score of each school assigns it to a quintile ranking which governs the amount of funding each school receives.⁹⁶ In doing so, it serves as pro-poor model used to determine the amount of funding each school receives.⁹⁷ It was expected that the State allocations for 60% of the NPNC expenditure must be distributed to the poorest 40% of schools that is, quintile 1 and 2 schools at least.⁹⁸ It was announced in 2009 that quintile 3 schools will also be classified as no-fee schools to alleviate the financial burden on these schools.⁹⁹ The State's allowance must be paid to schools in order to function throughout the year. Schools situated in poorer communities should receive more funding from the State compared to schools situated in wealthier communities. The DBE determines the amount the PED ought to allocate per learner

⁹³ Franklin & McLaren *Realising the right to basic education in South Africa* 19.

⁹⁴ 19,20.

⁹⁵ *Amended NNSSF* para 109.

⁹⁶ Mestry R & Ndhlovu R "The implications of the National Norms and Standards for School funding policy on the equity in South African public schools" (2014) 34 *SAJE* 1-11 at 3.

⁹⁷ 3.

⁹⁸ Giese S, Zide H, Kock R & Hall K *A study on the implementation and impact of the no-fee and exemption policies* (2009) 37. See also Mestry (2014) *Educational Management Administration & Leadership* 856.

⁹⁹ Mestry & Ndlovu (2014) *SAJE* 3.

in each quintile which is published in the Government Gazette annually.¹⁰⁰ In doing so, the DBE can ensure that the PED allocate every school in each quintile equal subsidies for learners. Furthermore, the DBE also determines an adequacy benchmark for NPNC expenditure.¹⁰¹ This benchmark is considered as “the minimally adequate amount for a learner’s right to basic education to be realised.”¹⁰²

4 3 2 No-fee schools

The intention behind no-fee schools is to make basic education available and accessible to all learners, especially those learners in poverty-stricken areas.¹⁰³ No-fee schools are part of the government’s plan to alleviate the lasting effects of poverty and to redress past imbalances.¹⁰⁴ The rationale behind no-fee schools is that the State wholly subsidises these schools. The funding that no-fee schools receive from the State is intended to cover NPNC expenditure items,¹⁰⁵ as it is the government’s duty to build schools and classrooms, and to pay the salaries of the teaching staff and support staff. In essence, this means that the SGB at no-fee schools are not allowed to set compulsory school fees, and the school may not levy such fees.¹⁰⁶ In doing so, poor households in socio-economically disadvantaged parts of society are protected against paying school fees.¹⁰⁷

At the same time, no-fee schools often face difficulty in trying to access additional funding. In this light, no-fee schools are allowed to raise additional funds for the benefit of the school through voluntary contributions and donations.¹⁰⁸ Gold and Evans suggests that a school cannot function in isolation from the broader community.¹⁰⁹ Furthermore, Gold and Evans submit that the school and the community is linked on a political, social and economic level in organising fundraising activities at schools.¹¹⁰ Thus, it can be deduced that the school is dependent on the surrounding community for voluntary contributions and donations.

¹⁰⁰ 3.

¹⁰¹ Mestry (2014) *Educational Management Administration & Leadership* 856.

¹⁰² Amended NNSSF para 109. See Arendse (2011) LDD 349; Mestry (2014) *Educational Management Administration & Leadership* 856.

¹⁰³ Mestry (2014) *Educational Management Administration & Leadership* 859.

¹⁰⁴ Amended NNSSF para 155.

¹⁰⁵ Paras 87 & 88.

¹⁰⁶ Paras 43 & 155.

¹⁰⁷ Para 43.

¹⁰⁸ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 147.

¹⁰⁹ Gold A & Evans J *Reflecting on school management: Matter classes in education series* (1998) 106.

¹¹⁰ 106.

In addition to these voluntary contributions, no-fee schools also receive compensatory funding in other areas such as school safety, nutrition programmes¹¹¹ and classroom construction.¹¹² The DBE stated that “any parent, including those granted any type of exemptions, can make voluntary contributions to the school fund.”¹¹³ Therefore, the SGB of a no-fee school are permitted to encourage learners, parents, educators and other staff at the school to provide voluntary services to the school. However, the practice of forcing parents to make a donation is strictly prohibited.¹¹⁴

4.3.3 Fee-charging schools

The post-apartheid legal framework for school fees and school funding makes it possible for certain ordinary public schools to charge school fees. These are the schools in quintile 4 and 5.¹¹⁵ School fees provide two important benefits for the schooling system. The first is that it provides SGBs the opportunity to raise revenue amongst those parents who can afford to contribute, which in turn allows the State to redirect preferential funding to poorer schools in poorer communities.¹¹⁶ Secondly, school fees encourage parents or guardians to participate in the governance of the school, and to promote accountability of schools towards the communities it serves.¹¹⁷

Section 39 of SASA makes it possible for the SGB to determine the amount of school fees charged. This legal framework creates a funding system dependant on funds from two sources, namely, fees payable by parents or guardians, and State funding. The SGB of a quintile 4 or 5 school is required to make “appropriate and equitable decisions” regarding the amount of school fees being charged.¹¹⁸ Hence, the SGB has discretion to decide how much school fees will be charged in terms of section 39(2) of SASA. In theory, this means that there may be quintile 4 and 5 schools where

¹¹¹ The National School Nutrition Programme is a project that was introduced by the State with the aim of alleviating poverty and unemployment and improving the learning capacity of learners. The feeding scheme specifically intends to assist poor children and to empower poverty-stricken communities, particularly in rural areas. See Mestry (2014) *Educational Management Administration & Leadership* 860.

¹¹² Mestry (2014) *Educational Management Administration & Leadership* 860. See also Wilderman RA *Reviewing eight years of the implementation of the School Funding Norms, 2000-2008* (2008) 6.

¹¹³ Contribution is defined as money or any kind of service a parent may render to the school. See Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 147.

¹¹⁴ 147.

¹¹⁵ *Amended NNSSF* para 156. See also Veriava (2007) *AHRLJ* 180.

¹¹⁶ *Amended NNSSF* para 152.

¹¹⁷ Para 152.

¹¹⁸ Para 127.

parents decide that the school should not levy school fees.¹¹⁹ Roithmayr suggests that “SASA imposes a duty on public SGBs to do their utmost best to improve the quality of education in these schools by raising additional resources to supplement State funding.”¹²⁰ Therefore, schools categorised in quintile 4 and 5 are known as fee-charging schools which are partially subsidised by the State in terms of NPNC expenditure. This means that quintile 4 and 5 schools receive less NPNC funding from the State as these schools are able to charge additional school fees. Quintile 4 and 5 encourages parents or guardians with good financial incomes to contribute to their children’s education in public schools.¹²¹ In this light, the Ministry expects less poor parent communities to contribute proportionately more to such a child’s education as the State funding per learner in quintile 4 and 5 schools are less than in schools serving poorer communities.¹²² Parents or guardians who cannot afford school fees in quintile 4 and 5 schools, can approach the school to apply for a fee-exemption regulated by the Regulations Relating to the Exemption of Parents from the Payment of School Fees (“Regulations”).¹²³ The Regulations will be discussed later in this chapter.¹²⁴

4 3 4 Concluding remarks

The quintile funding system functions by creating a two-tier system of schooling, namely, no-fee schools and fee-charging schools.¹²⁵ It is clear from the above, that parents who can afford to contribute proportionately more to their children’s education are expected to do so. This enables the State to direct more funds to poorer schools serving previously disadvantaged schools classified in quintiles 1 to 3. The next section will explore how much funding is allocated to quintile 1 to quintile 5 schools.

¹¹⁹ *Amended NNSSF* para 44. See also Veriava F “Free to learn: A discussion paper on the school fee exemption policy” in Leatt A & Rosa S (eds) *Towards a means to live: Targeting poverty alleviation to make children’s rights real* (2005) 5.

¹²⁰ Section 36 of SASA. See also *Amended NNSSF* para 37; Roithmayr (2003) *SAJHR* 386; Khumalo *Some implications* 62.

¹²¹ *Amended NNSSF* para 37.

¹²² Para 43.

¹²³ Exemption of Parents from Payment of School Fees Regulations, Government Gazette 19347 (12 October 1998).

¹²⁴ See section 5 2 below.

¹²⁵ Sayed Y & Motala S “Equity and ‘no fee’ schools in South Africa: Challenges and Prospects” (2012) 46 *Social Policy and Administration* 672-687 at 673.

4 4 Distribution of funding according to quintiles

The quintile funding system attempts to equalise the disparity between the low-income households and the high-income households by making basic education available to all. Moreover, the quintile funding system was designed to promote more equitable economic access to basic education.¹²⁶ In this light, the NNSSF policy can be regarded as an equity instrument as it aims to distribute the majority of NPNC expenditure to poorer schools.¹²⁷ Under 94% of South Africa's 25000 schools are State funded public schools where 12 million children are enrolled.¹²⁸ In 2017, 20478 schools were classified as no-fee schools, which represents 86.34% of the number of public schools, and 9 784 411 learners who did not pay school fees.¹²⁹ In this regard, the DBE designed this pro-poor model to achieve this objective of providing economic access to the majority of poor learners in the country. Thus, quintile 1 to 3 schools receive more funding for NPNC expenditure compared to the more affluent public schools in quintile 4 and 5. For example, in 2007, quintile 1 received R 738 per learner and quintile 5 received R123 per learner.¹³⁰

"The establishment of quintile 1 to 3 schools as no-fee schools means that in the 2014 updating of the NNSSF policy, the quintile formula for non-personnel funds to be distributed in these schools would be equal."¹³¹ Schools classified in quintile 1 to 3 received R1116 per learner in 2015 and R1177 per learner in 2016.¹³² This amount progressively diminishes up to quintile 5 where schools received R193 per learner in 2015 and R204 per learner in 2016.¹³³ In 2017, the national threshold for quintiles 1 to 3 was R1242 per learner, R622 per learner in quintile 4, and R215 per learner in quintile 5.¹³⁴ In 2018, the national threshold was R1316 per learner in quintile 1 to 3

¹²⁶ Hall K & Giese S "Addressing quality through school fees and school funding" in Pendlebury S, Lake L & Smith C (eds) *South African Child Gauge* (2009) 35.

¹²⁷ Mestry & Ndlovu (2014) *SAJE* 3.

¹²⁸ Skelton *Strategic litigation impacts: equal education for all* 49.

¹²⁹ NCOP Education and Technology, Sports, Arts and Culture meeting on "NSFAS on 2018 state of readiness; DEB quintile system; With minister" (29 November 2017) available at <https://pmg.org.za/committee-meeting/25629/> accessed 21-05-2020.

¹³⁰ Veriava (2007) *AHRLJ* 186.

¹³¹ McLaren "Funding" in *Basic Education Rights Handbook* 66.

¹³² Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996) Amended National Norms and Standard for School Funding* GN 17 in GG 38397 of 16 January 2015 4. See also Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* (2017) 143.

¹³³ Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996) Amended National Norms and Standard for School Funding* GN 17 in GG 38397 of 16 January 2015 4. See also Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* (2017) 143.

¹³⁴ Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996) Amended National Norms and Standard for School Funding* GN 17 in GG 38397 of 16 January 2015 4.

schools, R660 per learner in quintile 4 schools, and R228 per learner in quintile 5 schools.¹³⁵ In 2019, quintile 1 to 3 schools received R1390 per learner, whereas quintile 4 schools received R697, and quintile 5 schools received R241 per learner.¹³⁶ In 2020, public schools categorised in quintile 1 to 3 will receive R1468 per learner.¹³⁷ Quintile 4 schools receives R736 per learner, and quintile 5 schools receives R254 per learner.¹³⁸

4 5 Concluding remarks

This section aimed to set out the aims of the quintile funding system, the functioning thereof, and how funds are distributed to the different quintiles. According to the 2003 Plan of Action,¹³⁹ the “rationale for this ranking is to ensure that equally poor learners across the country is subject to the same pro-poor targeting.”¹⁴⁰ It is important to remember that the main aim of the quintile funding system is to redress past funding inequalities in the basic education system. Therefore, more funding is directed to the poorer schools categorised in quintile 1 to 3 schools. In doing so, the quintile funding system is providing all learners, especially poor learners with economic access to basic education. However, this is not the only measure the State has implemented to assist all learners with economic access to a basic education. Where school fees are levied in quintile 4 and 5 schools, parents are able to apply for fee-exemptions due to the inability to afford the school fees charged. The next section will explore the fee-exemptions implemented in fee-charging schools.

5 Other measures guaranteeing access to basic education

5 1 Introduction

The government has also implemented another measure that functions along with the no-fee school policy to ensure that poor learners are able to economically access basic education. This measure is known as school-fee exemptions. School fee exemptions assist poor learners to economically access basic education in fee-charging

¹³⁵. Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996) Amended National Norms and Standard for School Funding* GN 75 in GG 41420 of 2 February 2018 5.

¹³⁶ 5.

¹³⁷ 5.

¹³⁸ 5.

¹³⁹ Department of Education *Plan of action: Improving access to free and quality basic education for all* (2003).

¹⁴⁰ Hall & Giese “Addressing quality through school fees and school funding” in *South African Child Gauge* 37.

schools.¹⁴¹ In this way, no one can be denied admission, or otherwise be discriminated against, on grounds of the parents' or guardians' inability to pay school fees.¹⁴²

5.2 School-fee exemptions

SASA contains redistributive mechanisms that enables learners from poor households to attend fee-charging schools by way of fee exemptions. Parents and guardians who are unable to pay school fees in fee-charging schools may approach the school to request a fee exemption,¹⁴³ as the fee-exemption framework is aimed at assisting the most vulnerable learners.¹⁴⁴ Hence, it enables SASA to achieve its stated purpose to “redress past injustices in educational provisions [and] provide an education of progressively high quality of learners.”¹⁴⁵

Section 39(1)(b) of SASA obliges the SGB to “determine equitable criteria and the procedures for determining total, partial or conditional exemptions for parents unable to pay school fees.” In terms of section 3(1) of the Regulations, a school principal is required to inform all parents about school-fee exemptions, and to provide assistance to those parents who would like to apply for an exemption.¹⁴⁶ Parents are obliged to sign a form to confirm that they were informed about the school fees, and possible school-fee exemptions as the school has a general obligation to inform parents about fee-exemptions.¹⁴⁷ Additionally, the SGB is responsible to display the exemption regulations in a prominent place where parents have access to it.¹⁴⁸

There are a few types of exemptions that a parent or guardian can qualify for depending on the income of the parent or guardian.¹⁴⁹ The types of exemptions include an automatic exemption, a total exemption, and a conditional exemption.¹⁵⁰ Automatic exemptions are given to a certain group of individuals. This includes “a person with

¹⁴¹ Mestry (2013) *De Jure* 173. See also Veriava “Free to learn” in *Towards a means to live* 1.

¹⁴² Bisschoff & Mestry *Financial school management* 56.

¹⁴³ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149. See also Veriava “Free to learn” in *Towards a means to live* 6.

¹⁴⁴ Veriava “Free to learn” in *Towards a means to live* 7.

¹⁴⁵ Preamble of SASA.

¹⁴⁶ See *Centre for Applied Legal Studies v Hunt Road Secondary School* (10091/2006) 2007 ZAKZHC 6 (15 June 2007). In this case the applicants contended that the school did not inform them about their right to apply for an exemption and that given their income, they would have qualified for a full or partial exemption. The school was ordered, among others, to write to all parents and guardians informing them of their right to apply for exemptions from school fees and furnishing.

¹⁴⁷ Section 3(1) of the Regulations.

¹⁴⁸ Section 3(2) of the Regulations.

¹⁴⁹ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149.

¹⁵⁰ Section 5(1), 5(2) and 5(3) of the Regulations. See also Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149.

the parental responsibility of a learner who is in foster care, an orphanage, youth centre or a place of safety.”¹⁵¹ Furthermore, automatic exemptions are also given to a child who is head of the household, a parent or guardian who collects a social grant for a child, a caregiver of an orphan, or a child abandoned by parents.¹⁵² This group of individuals are required to fill in the fee-exemption form as provided by the school, and provide a court order, or a sworn affidavit confirming their status.¹⁵³ Additionally, an automatic exemption is granted “if the combined annual gross income of the parents is less than ten times the annual school fees per learner.”¹⁵⁴

Partial exemptions is also available for those individuals whose income is less than ten times the annual fees.¹⁵⁵ Partial exemptions take place when a parent or guardian qualifies for a discount on the school fees charged.¹⁵⁶ It is determined by the income of the parent or guardian in relation to the school fees. Conditional exemptions are granted to parents who qualify for partial exemptions but due to some personal circumstances cannot pay the full amount.¹⁵⁷ A conditional exemption may also be granted to parents who do not qualify for a fee exemption and can provide reliable information of the inability to pay school fees.¹⁵⁸

The matter of fee-exemptions has been judicially considered. In *Head of Department, Western Cape Education Department v MS*,¹⁵⁹ a declaration was sought to the effect that the school and the SGB repeatedly violated *MS*’ constitutional and statutory rights in relation to processing the 2011, 2012 and 2013 applications for fee exemptions. The violations were based on the school’s repeated threats of legal action for failure to pay school fees to *MS* in an aggressive bullying tone.¹⁶⁰ Moreover, a further declaration was sought that the Head of Department and the Minister of Basic Education had failed to comply with their constitutional and statutory obligations to ensure that fee-charging schools in the Western Cape comply with SASA and the

¹⁵¹ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149.

¹⁵² Section 1 of the Regulations. See also Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149.

¹⁵³ Section 4(3) of the Regulations. See also Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149.

¹⁵⁴ Maile S “Equal access to education: Who can afford?” (2004) 8 *Education As Change* 56-73 at 67. See also Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 149.

¹⁵⁵ 149.

¹⁵⁶ 149.

¹⁵⁷ Section 1 of the Regulations. See Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 150.

¹⁵⁸ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* (2017) 150.

¹⁵⁹ 2018 2 SA 418 (SCA).

¹⁶⁰ Para 20.

Regulations. The court held that fee exemptions are provided in criteria that will ensure that the economically disadvantaged at fee-paying schools are protected.¹⁶¹ The court further held that *MS* was able to claim an exemption based on the financial circumstances before the court, and that fee exemptions are granted on a fair, equitable and predictable manner.¹⁶²

In *Sorsa and Sorsa v Simonstown School*,¹⁶³ the parents of a learner were sequestered. Consequently, the parents were not able to afford the school fees anymore. The parents enquired whether a possible “subsidy” is available for parents unable to pay school fees. However, the parents were unaware that the legal term for this was an “exemption.”¹⁶⁴ Subsequently, the parents were informed by the school that no such subsidy is available. Subsequently, the parents received summons for the arrear school fees.¹⁶⁵ The court held that a legal basis exists for parents to challenge the decision of the SGB regarding school fees and fee exemptions as the school failed to inform the parents about possible fee exemptions.¹⁶⁶ Therefore, the parents succeeded in this case as the school failed to inform them about the availability of possible fee exemptions.¹⁶⁷

The cases above illustrate that fee-exemptions must be dealt with in a reasonable, predictable, and fair manner. It is of vital importance that parents are informed of their right to apply for fee-exemptions at fee-charging schools. In 2013, only 6.7% of learners benefitted from a total or partial fee exemption.¹⁶⁸ In light of the discussion above, it has been suggested that it is important that the DBE and PEDs oversee the transparent and lawful implementation of the fee-exemption policy to ensure that school are not prohibiting certain learners unlawfully.¹⁶⁹ This will ensure that the fee-exemption policy is implemented effectively, and that quality resources are available to all learners, not just the privileged learners in fee-charging schools.¹⁷⁰ Moreover, it has also been submitted that the PEDs “should be proactive in overseeing the school

¹⁶¹ Para 54.

¹⁶² Para 76.

¹⁶³ MC 29-05-2003 case no 2758/02.

¹⁶⁴ Veriava F “Enforcing the current laws on school fees” (2003) 4 *ESR Review* 11-14 at 12.

¹⁶⁵ 12.

¹⁶⁶ 13.

¹⁶⁷ 13.

¹⁶⁸ Statistics South Africa *General Household Survey, 2013 – P0318* (2014) available at www.statssa.gov.za/publications/P0318/P03182013.pdf. See also Franklin & McLaren *Realising the right to basic education in South Africa* 19.

¹⁶⁹ Franklin & McLaren *Realising the right to basic education in South Africa* 19.

¹⁷⁰ 19.

determinants of applications for fee-exemptions”¹⁷¹ as quintile 4 and 5 schools have a financial incentive to deny admission to non-fee paying learners.¹⁷² In doing so, the learners right to a basic education is not interfered with. Moreover, learners whose parents and guardians cannot afford school fees will not be denied access to public schooling.¹⁷³

6 Conclusion

This chapter aimed to explain and examine how State funding is distributed to public schools in order to redress past funding inequalities in the education system of South Africa. Previously, funding was grossly unequal as the apartheid government treated former White schools more favourably compared to former Black schools.¹⁷⁴ In this light, the democratic government sought to redress the funding disparities implemented during the apartheid era by the apartheid government.

Along with the Constitution, legislation and educational and funding policies, the State introduced and implemented the quintile funding system. The quintile funding system is aimed at the redressing the past funding inequalities in the education system of South Africa. In doing so, the State directs more NPNC funding to schools categorised in quintile 1 to 3 schools, that is, no-fee schools. For example, in 2020, quintile 1 to 3 schools receive R1468 per learner.¹⁷⁵ Quintile 4 schools receives R736 per learner, and quintile 5 schools receives R254 per learner.¹⁷⁶ The no-fee policy opened the door for previously disadvantaged learners to economically access basic education within their communities. Thus, it can be argued that the quintile funding system is reducing the funding disparities in the education system as more funds are directed to poor learners first. Additionally, the argument was also raised in this chapter that the State funding for infrastructure is also directed to redressing past inequalities in the education system of South Africa as more funding is directed towards poor schools.¹⁷⁷ Therefore, it can be submitted that 2 of the 3 big budget items

¹⁷¹ 19.

¹⁷² 19.

¹⁷³ *Amended NNSSF* para 45.

¹⁷⁴ See section 4 in Chapter 2.

¹⁷⁵ Department of Basic Education *South African Schools Act, 1996 (Act No 84 of 1996) Amended National Norms and Standard for School Funding* GN 75 in GG 41420 of 2 February 2018 5.

¹⁷⁶ 5.

¹⁷⁷ See section 3 and n 55 above.

are seemingly working towards reducing apartheid-inherited inequalities in the education system of South Africa.

The quintile funding system along with the implementation of the fee-exemption policy makes it possible for poor learners to attend school. This means that no learner is left behind as all learners can economically access basic education in public schools. Both these options ensure that economic access to the right to a basic education is realised. The next chapter will analyse whether the implementation of quintile funding system is directed towards reducing past inequalities in the education system of South Africa, with particular focus on the funding inequalities.

Chapter 5: The impact of the quintile funding system in reducing apartheid-inherited inequalities in the education system of South Africa

1 Introduction

This chapter aims to analyse the impact of the quintile funding system in reducing apartheid-inherited inequalities in the basic education system of South Africa. This will be done by analysing whether the State is fulfilling its constitutional and international obligations in providing learners with economic access to basic education through the implementation of the quintile funding system.¹ However, the problems that must be addressed to reduce the apartheid-inherited inequalities in basic education is much broader, and must be addressed holistically. This chapter will start off by analysing the contextual interpretation of the right and examine whether the aims of the quintile funding system is in line with the contextual interpretation of the right to a basic education. Moreover, this chapter will discuss whether the quintile funding system is in line with the transformative role of the Constitution as its main aim is to redress past funding inequalities in the basic education system.

Redressing past imbalances and achieving equity were central to the restructuring of the education system in South Africa.² This chapter will examine whether the State is complying with its constitutional obligations in terms of section 7(2) of the Constitution which provides that the State must “respect, protect, promote and fulfil” the rights provided for in the Bill of Rights. Moreover, compliance with the constitutional obligations guaranteed in section 29(1)(a) of the Constitution will also be examined. This chapter will proceed to discuss the international obligations imposed on the State. Firstly, it will analyse whether the State is in compliance with its general international obligations as it is similar to the provisions in section 7(2) of the Constitution. Lastly, this chapter will examine whether basic education is economically accessible for all learners, and the implications of the State’s policy in relation to the school fee system in order to economically provide access to basic education. As mentioned above, the

¹ This study explores whether the quintile funding system improves access to public schooling for learners, especially previously disadvantaged learners, and not whether the implementation of the quintile funding system improves the quality of basic education.

² Mestry (2014) *Educational Management Administration & Leadership* 852.

right to a basic education must be viewed holistically. In this light, there are certain educational inputs in education that play a role in reducing apartheid-inherited inequalities in the basic education system. It will be argued that these inputs create barriers to access basic education. These educational inputs in education include the availability of textbooks, school furniture, transport costs, and school infrastructure.³

2 Analysis of constitutional obligations

2.1 Contextual interpretation of the right to a basic education

The Constitutional Court has adopted a contextual method in interpreting socio-economic rights in the Bill of Rights.⁴ This approach requires that a socio-economic right to be interpreted in two types of contexts. The first is to understand the right in its textual context, which is to consider Chapter 2 of the Constitution as a whole.⁵ Secondly, that this right must also be understood in terms of its social and historical context.⁶ The post-apartheid State inherited an education system that was grossly unequal. The apartheid government purposefully tried to ensure that the majority of the population could not be anything more than “hewers of wood and drawers of water.”⁷ To give rise to this, former White schools were treated more favourably by the apartheid government than former Black schools.⁸ As a result, some Black learners were either denied access to basic education or denied equal educational opportunities and resources enjoyed by White learners. The post-apartheid government sought to transform the education system to “increase access and retention of black learners, achieving equity in public funding...”⁹

In terms of the textual context consideration, as mentioned in chapter 3,¹⁰ the Constitution has been hailed as a transformative document aimed at redressing past

³ These costs and factors are not the only costs and factors influencing the quality of basic education received by learners in no-fee schools. However, this study is limited to the costs and factors listed above.

⁴ *Government of RSA v Grootboom* 2000 11 BCLR 1169 (CC) para 24.

⁵ Para 22.

⁶ Paras 22 & 25.

⁷ Woolman & Bishop “Education” in *CLOSA* 57-12. See also Fleisch & Woolman *Constitution in the classroom* 109,123.

⁸ Johnson (1982) *Anthropology & Education Quarterly* 217.

⁹ Department of Education *White paper on Education and Training in a democratic South Africa: First steps to develop a new system* GN 196 in GG 16312 of 15 March 1995 (“White Paper 1”) para 1. See also Veriava (2007) *AHRLJ* 181.

¹⁰ See section 2.2 in Chapter 3.

injustices in order to create a more egalitarian society.¹¹ The right to a basic education was included in the Bill of Rights to assist the underprivileged and previously disadvantaged people in society in order to protect their interests and fundamental needs. Furthermore, section 34 South African Schools Act 84 of 1996 (“SASA”), obligates the State to “redress past inequalities in the basic education system.”¹² In conjunction with SASA, the National Norms and Standards for School Funding policy (“NNSSF policy”), as amended,¹³ attempts to dismantle the unfair and unequal funding of public schools based on race and ethnicity of the past.¹⁴ In this regard, the Constitutional Court has interpreted the specific history of apartheid in order to give a contextual meaning to the right to a basic education.¹⁵ The Constitutional Court in *Governing Body of the Juma Musjid Primary School v Essay* (“*Juma Musjid*”)¹⁶ and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* (“*Ermelo*”)¹⁷ recognised the importance of access to basic education for all learners.¹⁸ Given South Africa’s history of apartheid, the transformative role of the Constitution, and certain international law obligations,¹⁹ section 29(1)(a) of the Constitution guarantees free basic education for previously disadvantaged learners first before it is extended to more advantaged learners.²⁰ Furthermore, Arendse suggests that “a contextual interpretation of the right to a basic education necessitates the provision of free basic education at least to disadvantaged” and marginalised learners first in order to meet the requirements in the Constitution.²¹

In light of the above, the introduction of free schooling in the poorest schools in South Africa is one of the most significant reforms since apartheid.²² Therefore, it is submitted that the quintile funding system is in line with the contextual interpretation and textual context of the right to a basic education. Previously disadvantaged

¹¹ Preamble of the Constitution. See also De Vos (2001) *SAJHR* 259; Pieterse A (2004) *TSAR* 709; Brand “The South African Constitutional Court and livelihood rights” in *Transformative constitutionalism* 414; Arendse (2019) *LDD* 102.

¹² Hall & Giese “Addressing quality through school fees” in *South African Child Gauge* (2009) 35.

¹³ Department of Education *South African Schools Act, 1996 (Act No 84 of 1996): Amended National Norms and Standard for School Funding* GN 869 in GG 29179 of 31 August 2006 (“*Amended NNSSF*”).

¹⁴ Mestry (2014) *Educational Management Administration & Leadership* 852.

¹⁵ De Vos (2001) *SAJHR* 263. See also Arendse (2011) *PELJ* 118.

¹⁶ 2011 8 BCLR 761 (CC).

¹⁷ 2010 2 SA 415 (CC).

¹⁸ Franklin & McLaren *Realising the right to basic education in South Africa* 3.

¹⁹ The call for free basic education in international law will be discussed later in this chapter.

²⁰ Arendse (2011) *PELJ* 98.

²¹ 98, 118.

²² Veriava *Realising the right to basic education* 132. See also Veriava “Realising the right to basic education” in *Socio-economic rights* 84.

learners, and learners who would previously have been denied access to basic education now have economic access to basic education in no-fee schools. In this regard, the no-fee schools reform has improved access to public schooling.²³ Furthermore, in providing increased access to schooling, previously disadvantaged and vulnerable learners are catered to first in terms of the provision of no-fee schools. In turn, the NNSSF policy has made it possible that the inequalities in resource allocations from the State have been removed.²⁴ Hence, the implementation of national quintiles allows the government to ensure that “equally poor learners across the country will be subject to the same pro-poor targeting.”²⁵ This implies that no one may be turned away from receiving a basic education due to the inability to pay school fees.²⁶

The quintile funding system is seemingly in line with the transformative role of the Constitution as the quintile funding system also aims to redress past funding inequalities between former White and former Black schools.²⁷ As previously explained, Black learners did not receive a lot of funding from the apartheid government.²⁸ However, under the new dispensation, the funding disparities have been alleviated as previously disadvantaged learners and marginalised learners have access to a free basic education by attending a no-fee school. It has been argued that the quintile funding system does not eliminate funding disparities but instead it advantages the rich and wealthy.²⁹ In this regard, it is submitted that previously disadvantaged learners are catered for first by the provision of no-fee schools. The quintile funding system gives no-fee schools preferential access to resources in order for those learners to enjoy a level of funding previously enjoyed by the most advantaged schools. In doing so, the quintile funding system is eliminating the funding disparity previously implemented by the apartheid government, and in turn, the quintile funding system is providing economic access to all learners, especially those left

²³ Veriava *Realising the right to basic education* 44,132.

²⁴ Mestry (2014) *Educational Management Administration & Leadership* 853.

²⁵ Veriava & Wilson (2003) *ESR Review* 11.

²⁶ Skelton *Strategic litigation impacts: equal education for all* 47.

²⁷ *Amended NNSSF* para 109. See also Mestry (2014) *Educational Management Administration & Leadership* 851.

²⁸ See section 4.2 of Chapter 2.

²⁹ Brown K “New educational injustices in the ‘new’ South Africa: A call for justice in the form of vertical equity” (2006) 44 *Journal of Educational Administration* 509-519 at 514. See also Fataar A *Education policy development in South Africa’s democratic transition 1994-1999* (2010) 211; Khumalo *Some Implications* 83.

marginalised and vulnerable by the legacy of apartheid. Accordingly, the quintile funding system is redressing past funding disparities between Black and White learners by providing more funding³⁰ to previously disadvantaged schools than previously advantaged schools.³¹

2.2 Constitutional obligations

2.2.1 *Constitutional obligations in terms of section 29(1)(a) of the Constitution*

Section 29(1)(a) of the Constitution states that “everyone has the right to a basic education...” Arendse suggests that the nature of the right to a basic education requires the State to make basic education available and accessible to all.³² Moreover, Woolman and Fleisch offers a reading of section 29(1)(a) of the Constitution that would explain the unqualified nature of the right in a manner that does not make a hash of the budgetary constraints faced by the apartheid government:

“The absence of an internal limitation for the right to basic education, makes sense when viewed through the lens of the Apartheid-era funding inequalities. The drafters wanted to reaffirm the primacy of education in a social democracy and to undermine any attempt to perpetuate unequal levels of State funding. The historical context and aspirational content of the South African Constitution requires a more nuanced reading of the absence of the internal limitation in [FC s] 29(1)(a). In short, the section should be read as a reminder that the State may never again use education as a vehicle for the reproduction of – and must make every effort possible to eliminate all vestiges of – Apartheid-era patterns of inequality.”³³

It is subsequently submitted that by entrenching the right to a basic education in the Bill of Rights, and by implementing subsequent legislation and funding policies, the State has made strides to make basic education available and accessible to all. In doing so, the State is complying with its constitutional obligation to make basic education available and accessible to all learners from grade R to grade 12. Similarly, by providing learners from grade R to 12 with the opportunity to attend school, whether that is attending school in a no-fee school or fee-charging school with fee-exemptions, satisfies the State’s constitutional obligation to provide learners with a basic education.³⁴ Moreover, it can be inferred that the unqualified nature of the right to a basic education also calls for equal State funding of basic education as the quote

³⁰ When reference is made to funding provided by the quintile funding system in this chapter, it speaks to the funding schools receive for NPNC expenditure as explained in chapter 4 of this study.

³¹ Fleisch & Woolman *Constitution in the classroom* 224.

³² Arendse (2011) *PELJ* 97.

³³ Fleisch & Woolman (2004) *Perspectives in Education* 111. See also Fleisch & Woolman *Constitution in the classroom* 125.

³⁴ Berger (2003) *Col LR* 626.

above makes it clear that the funding inequalities of the past should not be perpetuated.³⁵ It is clear from the discussion in Chapter 4, that schools in poor areas are afforded more State funding per learner because wealthier schools are able to charge school fees in terms of section 39(1)(b) of SASA.³⁶ In this light, the implementation of the quintile funding system furthers the compliance by the State to make basic education available and economically accessible to all. In turn, the quintile funding system also eliminates past funding inequalities in the education system by providing free basic education in quintile 1 to 3 schools from grade R to grade 12. Subsequently, the State makes it possible for poor learners at former Black schools to economically access basic education in public schools.³⁷

2 2 2 Constitutional obligations in terms of section 7(2) of the Constitution

Section 7(2) of the Constitution provides that the State must “respect, protect, promote and fulfil” the provisions in the Bill of Rights as discussed in chapter 3.³⁸ This provision suggests that the State must play an active role in improving access to rights that places a positive obligation on the State.³⁹ Thus, the State is required to fulfil the right to a basic education as a socio-economic right as a failure to provide would be in contravention with the Constitution.⁴⁰ Fulfilling the right to a basic education means that the State must adopt an “appropriate legislative, administrative, budgetary, judicial, promotional and other measures”⁴¹ so that those who do not enjoy access to rights can gain access to it. Accordingly, the State must take positive steps to ensure that those learners who lack access to basic education do gain access to a basic education.⁴² By establishing no-fee schools, the State has arguably fulfilled its duty to fulfil the right to a basic education by aiding previously disadvantaged and vulnerable learners to gain economic access basic education.⁴³ Furthermore, it can also be

³⁵ Fleisch & Woolman (2004) *Perspectives in Education* 111. See also Fleisch & Woolman *Constitution in the classroom* 125.

³⁶ See sections 4 3 2 & 4 3 3 in Chapter 4.

³⁷ McLaren “Funding” in *Basic Education Rights Handbook* 66. See also Mestry (2014) *Educational Management Administration & Leadership* 859.

³⁸ See section 4 1 in Chapter 3.

³⁹ Berger (2003) *Col LR* 626.

⁴⁰ 635.

⁴¹ De Vos & Freedman *Constitutional law* 672.

⁴² *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9. See also Arendse *PELJ* (2011) 103.

⁴³ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* 144.

argued that the right to a basic education is fulfilled as there are no barriers to access basic education.⁴⁴ In light of this statement, it is important to clarify that there are no economic barriers to access basic education as fees have been lifted in quintile 1 to 3 schools, and the fee-exemption policy has been implemented in fee-charging schools.⁴⁵

Similarly, the State is also complying with its duties to respect, protect and promote the right to a basic education. No-fee schools make it possible for all learners to have access to educational facilities where all learners can benefit from a basic education. The State and courts have made strides in protecting the right to a basic education by ensuring that no one hinders a learner's access and enjoyment of the right as illustrated in *Juma Musjid*. In this case, the Constitutional Court held that a private body, in this case the Trustees, had an obligation not to interfere or diminish the learners' right to a basic education.⁴⁶ The State has complied with its obligation to enable all learners, especially the marginalised and vulnerable learners, to economically access a basic education. Furthermore, it is submitted that no-fee schools promote effective access to the right to a basic education as the State is ensuring that all learners participate in the basic education system. Thus, this thesis submits that the State is in line with its constitutional obligations in terms of sections 7(2) and 29(1)(a) of the Constitution to provide learners with economic access to basic education in public schools.

2 3 Concluding remarks

Based on the arguments made above, it is evident that the State complies with its constitutional obligations to provide economic access to a basic education for all learners, especially previously disadvantaged and vulnerable learners. Moreover, the State has made strides to respect, protect, promote, and fulfil the right to a basic education. The quintile funding system has made it possible for the State to provide economic access to basic education to previously disadvantaged learners first, before privileged learners are catered for. In doing so, the State is redressing past funding inequalities between former White and Black schools. Thus, in terms of the obligations in section 7(2) and section 29(1)(a) of the Constitution, and the contextual

⁴⁴ Roithmayr (2003) *SAJHR* 383.

⁴⁵ More analysis on barriers to access basic education will be provided later in this chapter.

⁴⁶ *Juma Musjid* paras 53 & 58.

interpretation of the right to a basic education, the quintile funding system provides economic access to basic education to all learners. The next section will look at the State's compliance with its international law obligations. It will focus on the general international obligations and the economic accessibility obligation on the State in particular.

3 Analysis of international law obligations

3 1 Compliance with general international obligations

The State is also under general international obligations to respect, protect and fulfil the right to a basic education. These obligations are similar to the constitutional obligations in terms of section 7(2) of the Constitution as discussed in chapter 3.⁴⁷ In light of the arguments made above regarding the compliance with the obligations imposed on the State in section 7(2) of the Constitution, it is submitted that the State complies with the general international obligations to respect, protect and fulfil the right to a basic education.⁴⁸

3 2 Economic accessibility to public schooling and the implication of school fees

It is clear from the above that international law discourse calls for free and compulsory primary education.⁴⁹ It has been argued by many authors and scholars that basic education in South Africa is not accessible to all learners.⁵⁰ As from the discussion above, public schools are separated into five quintiles based on certain factors such as the economic wealth of the surrounding community.⁵¹ Generally this means that the top quintiles (quintile 4 and 5) receives less funding than the poorer quintiles (quintile 1, 2 and 3). Section 39(1) of SASA authorises certain public schools, that is, quintile 4 and 5 schools, to charge school fees.⁵² In order to prevent the exclusion of poor learners at fee-charging schools, SASA also makes provision for a fee-exemption policy.⁵³ This section will aim to analyse whether or not the imposition of school fees creates a barrier to economically access public schooling, whether the implementation of the fee-exemption policy in fee-charging schools are geared towards realising

⁴⁷ See section 4 1 in Chapter 3.

⁴⁸ CESCR *General Comment No 13* (1999) para 46. See also Arendse (2011) *PELJ* 103.

⁴⁹ See section 3 3 & 4 2 3 2 in Chapter 3.

⁵⁰ Woolman & Bishop "Education" in *CLoSA* 57-25. See also Khumalo *Some implications* 78.

⁵¹ See section 4 2 & 4 3 in Chapter 4.

⁵² Schools classified in quintile 4 and 5 are permitted to charge school fees.

⁵³ See section 5 in Chapter 4 for a discussion on the fee-exemption policy.

economic access to public schooling in South Africa. Here it is important to note that by the establishment of no-fee schools, the State is already complying with its international law obligation to provide access to free basic education. This will also become clear throughout the discussion below.

Brown argues that the imposition of school fees hinders access to basic education for poor learners.⁵⁴ Roithmayr also argues that school fees prevent learner access to basic education.⁵⁵ Furthermore, it has been argued that the imposition of school fees is a barrier to basic education for the majority of learners.⁵⁶ Roithmayr also notes that schools have not been granting exemptions to parents who cannot afford the cost of school fees have been discriminated against, and that people have been unwilling to apply for exemption because of the embarrassment that accompanies an admission of poverty.⁵⁷ Roithmayr argues that these flaws in the implementation of the fee-exemption system does not meet the State's obligation to provide basic education for everyone. Moreover, it was argued that even though there are fee-exemptions, evidence supports that school fees create barriers for some families.⁵⁸ Hence, it "perpetuates systemic inequalities in the allocation of funding among learners."⁵⁹ However, Fleisch and Woolman contend that school fees do not create a barrier to access basic education.⁶⁰

Fleisch and Woolman contend that school fees do not perpetuate inequality in public schools as the application of the policy does not support the link between school fees and persistent systematic failure.⁶¹ The policy releases resources for distribution among public schools from the wealthier to the poorest schools. For purposes of this study, the interpretation by Fleisch and Woolman stands as school fees do not create a barrier to access basic education.⁶² This argument is supported by Woolman and Bishop who submits that school fees are not the primary financial obstacle to education.⁶³ Accordingly, it is submitted that the quintile funding system made it

⁵⁴ Brown (2006) *Journal of Educational Administration* 515.

⁵⁵ Roithmayr D *The constitutionality of school fees in public education* (2002) 39-46.

⁵⁶ Arendse (2011) *LDD* 356.

⁵⁷ Woolman & Bishop "Education" in *CLOSA* 57-25.

⁵⁸ Veriava (2007) *AHRLJ* 183.

⁵⁹ Roithmayr (2003) *SAJHR* 391. See also Khumalo *Some implications* 80,81.

⁶⁰ Mestry (2014) *Educational Management Administration & Leadership* 856 cited Fleisch B & Woolman S *Elusive equity: Education Reform in Post-Apartheid South Africa* (2004).

⁶¹ Mestry (2014) *Educational Management Administration & Leadership* 856 cited Fleisch B & Woolman S *Elusive equity: Education Reform in Post-Apartheid South Africa* (2004).

⁶² Fleisch & Woolman *Constitution in the classroom* 218,219.

⁶³ Woolman & Bishop "Education" in *CLOSA* 57-27.

possible for learners from poorer communities to attend no-fee schools as the State is able to direct money away from quintile 4 and 5 schools and direct it to the poorer quintile schools.⁶⁴ Where school fees are charged, the State has implemented a strong exemption policy to fully, partially or conditionally exonerate a parent or guardian from paying school fees.⁶⁵ As mentioned above, Roithmayr argues that the fee-exemption policy does not provide all learners with basic education, and that the charging of school fees creates a barrier to access basic education. In theory, the fee-exemption policy should be in line with the State's constitutional obligation that basic education must be financially accessible for all. Thus, those who are able to pay for schooling will pay and those who cannot afford the cost of schooling will receive free, subsidised education by the State.⁶⁶ As Fleisch and Woolman note, the analysis by Roithmayr attempts to "redress ongoing problems of adequacy, access [an] equality through the complete elimination of school fees."⁶⁷

A counterargument has been raised by authors that the educational inputs in education such as transport costs, infrastructure, and the availability of textbooks denies access to quality basic education.⁶⁸ It is submitted that these inputs does not take away from the fact that the quintile funding system has established free schools in order to provide all learners economic access to basic education. It is important to make the distinction between the function and the implementation of the quintile funding system in providing learners with economic access to basic education, and the educational inputs in education that work against providing learners with quality education in no-fee schools.⁶⁹

According to statistics, South Africa has attained almost universal access to basic education as over 98% of South African learners attend school.⁷⁰ Moreover, the introduction of the no-fee school policy has improved the drop-out rates of public schooling on a national scale.⁷¹ South Africa is a signatory to the UN Millennium

⁶⁴ Woolman & Bishop "Education" in *CLoSA* 57-28. See further Fleisch & Woolman *Constitution in the classroom* 222.

⁶⁵ Sections 5(1), 5(2) and 5(3) of the Exemption of Parents from Payment of School Fees Regulations, Government Gazette 19347 (12 October 1998).

⁶⁶ Woolman & Bishop "Education" in *CLoSA* 57-25.

⁶⁷ Fleisch & Woolman *Constitution in the classroom* 119,120. See also Woolman & Bishop "Education" in *CLoSA* 57-26.

⁶⁸ Woolman & Bishop "Education" in *CLoSA* 57-27.

⁶⁹ These factors will be discussed below.

⁷⁰ Statistics South Arica *General Household Survey, 2010* (2011). See also Khumalo *Some implications* 79.

⁷¹ Mestry (2013) *De Jure* 175.

Declaration. The millennium goal for education is the achievement of universal primary education by 2015. According to the South African Millennium Development Goal Country report:⁷²

“South Africa has achieved the goal of universal primary education before the year 2015, and its education system can now be recognised as having attained near universal access.”

Given South Africa’s history, many learners from poverty-stricken and vulnerable communities, mainly Black learners, were in some instances denied access to basic education. Poor learners are catered for first by the State providing more funding to these schools on a sliding scale of funding. Thus, in theory the quintile funding system implemented by the State supports the argument that those learners who are able to afford school fees will pay, and those parents or guardians who cannot afford to pay, will receive free, subsidised basic education.⁷³ Accordingly, the school fee system enables the Provincial Education Departments (“PED”) to implement State funding that intentionally and actively privileges poor learners.⁷⁴ In light of this, “social justice in the provision of education needs to translate into a broader educational transformation and empowering process.”⁷⁵ This can be seen to translate into meaningful positive benefits in the classroom and the school as a whole, and in terms of outcomes and upward mobility of previously disadvantaged learners.⁷⁶ Moreover, two further policy considerations suggest the intrinsic value of the school fee system which are rooted in a commitment to participatory democracy.⁷⁷ Firstly, the ultimate objective of school fees is not to reintroduce the existing patterns of class disparities.⁷⁸ In this light, the current fee structure “ensures that the vast majority of South African learners continue to participate in public institutions and see themselves as part of the larger political community.”⁷⁹ Secondly, Brand suggests that the school fees system “may further important principles of community engagement and interdependence.”⁸⁰ Brand further states that the critical values of democracy, that is, participation, citizenship, co-operation, self-governance, can “potentially be advanced by the [school fee] system

⁷² Government of the Republic of South Africa *Millennium Development Goals: Country Report 2010* (2012) 47.

⁷³ Woolman & Bishop “Education” in *CLoSA* 57-25.

⁷⁴ Fleisch & Woolman (2004) *Perspectives in Education* 117.

⁷⁵ Mestry (2014) *Educational Management Administration & Leadership* 854.

⁷⁶ 854.

⁷⁷ Fleisch & Woolman (2004) *Perspectives in Education* 121.

⁷⁸ 121.

⁷⁹ 121.

⁸⁰ Brand D *Community participation and user fees* (unpublished manuscript) (2003) 4. See also Fleisch & Woolman (2004) *Perspectives in Education* 121.

not only within specific school, but also across racial and class lines... if creative forms of cross-subsidisation can be implemented.”⁸¹

Woolman and Bishop further suggest that the drafters of the Constitution took a utilitarian approach to the right to a basic education.⁸² This is based on the view that by allowing school fees, it would allow for meaningful cross subsidisation of poor learners by wealthier learners.⁸³ Moreover, the call for the complete elimination of school fees will diminish the capacity for multiple forms of cross-subsidisation of wealthier and impoverished schools.⁸⁴ Hence, in order for everyone to benefit from basic education, more funding is needed in poorer schools than wealthier schools.⁸⁵ In light of this, the assumption is that schools that serve less poor communities are better equipped to raise their own funds and in doing so, require less financial support from the State. Consequently, it is submitted that the quintile funding system has made strides to ensure the economic accessibility of basic education to previously disadvantaged and vulnerable groups by the establishment of no-fee schools. In doing so, the State is partially in line with meeting its international law obligations in terms of providing free basic education to all learners. Furthermore, by establishing no-fee schools, the State has arguably fulfilled this duty by aiding poor learners to gain economic access basic education.⁸⁶ Moreover, it can be argued that the right to a basic education is fulfilled, as there are no barriers to access basic education,⁸⁷ economically. The introduction of no-fee schools has resulted in relieving the burden of school fees on poor parents.⁸⁸ Although, universally, basic education is not free for all learners in South Africa, the implementation of the quintile funding system policy by the government is geared towards the realisation of access to affordable basic education for all.

⁸¹ Brand D *Community participation and user fees* 4. See also Fleisch & Woolman (2004) *Perspectives in Education* 121.

⁸² Woolman & Bishop “Education” in *CLoSA* 57-05.

⁸³ Woolman & Bishop “Education” in *CLoSA* 57-05. See further Fleisch & Woolman *Constitution in the classroom* 232.

⁸⁴ Woolman & Bishop “Education” in *CLoSA* 57-28.

⁸⁵ Berger (2003) *Col LR* 619.

⁸⁶ Dass & Rinquest “School Fees” in *Basic Education Rights Handbook* 144.

⁸⁷ Roithmayr (2003) *SAJHR* 383.

⁸⁸ Hall & Giese “Addressing quality through school fees” in *South African Child Gauge* (2009) 40.

3 3 Concluding remarks

In this section, one of the biggest considerations was whether the charging of school fees creates a barrier to economically access the right to a basic education in fee-charging schools. It has been argued that school fees create a barrier to access basic education. This section found that the charging of school fees does not create a barrier to economically access basic education for various reasons listed above.⁸⁹ In this light, the State is in compliance with the general international obligations to respect, protect and fulfil the right to a basic education as these obligations are similar to the obligations in terms of section 7(2) of the Constitution. Moreover, considering the arguments made above regarding accessibility, it is evident that the implementation of the no-fee schools in quintile 1 – 3 schools, the State is gradually making basic education free for all learners. In turn, this argument supports that the State is in partial compliance with the call for free basic education for all learners. In this sense, the impact of the quintile funding system is quite significant. The quintile funding system was initially implemented by the State to address the funding inequalities in basic education in public schools. It has been established that not only has the quintile funding system made strides in providing poor learners with free education first, but in doing so it has reduced the funding inequalities established during the apartheid era. More resources and funding are directed to no-fee schools in poor areas to ensure that poor learners enjoy a level of funding that was previously implemented for White schools only. In light of this, the quintile funding system has made a significant impact on apartheid-inherited inequalities in the education system of South Africa.

However, it must be noted that although there appears to be compliance with constitutional and international obligations in terms of the economic accessibility to basic education there are still many inequalities that persists in the education system today. For example, matric pass rates in no-fee schools, which enables social mobility, is still vastly unequal.⁹⁰ This illustrates that the quintile funding system alone cannot reduce all the apartheid-inherited inequalities in the education system. The next section will briefly mention some educational inputs that play a vital role in accessing quality education in no-fee schools.⁹¹

⁸⁹ See section 3 3 above.

⁹⁰ See section 4 4 in Chapter 2.

⁹¹ It is important emphasise the vital distinguish between the function and objectives of the quintile funding system to provide all learners with economic access to basic education and other costs and factors that influences receiving quality education in no-fee schools.

4 The educational inputs in education

4 1 Introduction

The National Development Plan (“NDP”)⁹² for 2030 aims to eliminate poverty and reduce inequality by 2030.⁹³ South Africa has made significant progress in the transition from apartheid. However, “South Africa remains a highly unequal society as too many people still live in poverty and too few are employed.”⁹⁴ The deep split of apartheid is still felt today as the legacy of apartheid still determines life opportunities for the marginalised people of society.⁹⁵ In 2011, the National Planning Commission appointed by then President Jacob Zuma identified that one of the primary challenges is the poor quality of school education for Black learners.⁹⁶ Therefore, the young people of South Africa deserve better educational opportunities.⁹⁷ South Africa aims to give all South Africans access to education of the highest quality by 2030.⁹⁸ The NDP states that “education should be compulsory up to grade 12 or equivalent levels in vocational education and training.”⁹⁹ Similarly, the importance of quality education is also recognised internationally.

The United Nations & United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) have liaised closely in educational matters to eliminate illiteracy, to focus the human rights and education of the youth, and the eradication of discrimination in education.¹⁰⁰ The constitution of UNESCO recognises education as a basic human right. Article 1(1) of its constitution states that the purpose of UNESCO is to contribute to peace and security by promoting collaboration among nations by education. Furthermore, article 1(2) requires member states to develop educational activities, advance the ideal of equality of educational opportunities, and to suggest educational methods best suited to prepare children for the responsibilities of freedom. Accordingly, education must be matched by quality.

⁹² National Planning Commission, Department of the Presidency, Republic of South Africa *National Development Plan 2030: Our future – make it work* (2013).

⁹³ 1,24.

⁹⁴ 1,24.

⁹⁵ 24.

⁹⁶ 24.

⁹⁷ 23.

⁹⁸ 296.

⁹⁹ 296.

¹⁰⁰ Hodgson (1996) *International Journal of Children's Rights* 239.

Goal 4 of the Sustainable Development Goals (“SDG”)¹⁰¹ makes provision for inclusive and equitable quality education.¹⁰² It states that education provides people with the opportunity to break out of the poverty cycle.¹⁰³ In doing so, it reduces inequalities.¹⁰⁴ This section will explore the educational inputs in education that also plays a vital role in reducing apartheid-inherited inequalities in the basic education system as pass rates in no-fee schools that enables social mobility is vastly unequal.

4.2 A comparison of through-put rates in quintile 1 and 5 schools

The aim of this study was to examine whether the State is reducing apartheid-inherited inequalities in the basic education system through the implementation of the quintile funding system. This chapter found that the State is in full compliance with its constitutional obligation and in partial compliance with its international obligation to provide economic access to basic education for all learners. However, even though the State is providing no-fee schools with more NPNC funding than fee-charging schools, there is still a low throughput rate in these schools. For example, 70% of learners in a quintile 1 school who wrote matric in 2014 passed.¹⁰⁵ Whereas 92% of learners who attended quintile 5 schools passed.¹⁰⁶ In 2016, roughly 28% of learners in quintile 1 schools passed matric with a bachelor’s pass.¹⁰⁷ Whereas roughly 87% of learners in quintile 5 achieved a bachelor’s pass in 2016.¹⁰⁸ In 2017, 33% of learners in quintile 1 received a bachelor’s pass, compared to 84% of learners in quintile 5.¹⁰⁹

¹⁰¹ *Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all* (“Education 2030”) ED-2016/WS/28 (2016).

¹⁰² *Education 2030* 7.

¹⁰³ 7,27.

¹⁰⁴ United Nations Organisation “Quality education: why it matters” available at <https://www.un.org/sustainabledevelopment/wp-content/uploads/2018/09/Goal-4.pdf> accessed 25-08-2020.

¹⁰⁵ Spaul N “Education in SA – still separate and unequal” (12-01-2014) *Nic Spaul* <https://nicspaul.com/2014/01/12/education-in-sa-still-separate-and-unequal-extended-version-of-citypress-article/> accessed 25-08-2020.

¹⁰⁶ Spaul N “Education in SA – still separate and unequal” (12-01-2014) *Nic Spaul* <https://nicspaul.com/2014/01/12/education-in-sa-still-separate-and-unequal-extended-version-of-citypress-article/> accessed 25-08-2020.

¹⁰⁷ Department of Basic Education *Report on the 2017 National Senior Results: Examination report* (2017) 58. 37036 of 134409 learners in quintile 1 obtained a bachelor pass. A bachelor pass in matric is 80% and higher.

¹⁰⁸ Department of Basic Education *Report on the 2017 National Senior Results: Examination report* (2017) 58. 83507 of 96533 learners in quintile 5 obtained a bachelor’s pass.

¹⁰⁹ Department of Basic Education *Report on the 2017 National Senior Results: Examination report* (2017) 58. In quintile 1, 37350 of 111760 of learners obtained a bachelor pass in 2017. Conversely, 78760 of 93614 in quintile 5 received a bachelor’s pass.

In 2018, roughly 40% of learners in quintile 1 who wrote the matric examination, passed with a bachelor pass.¹¹⁰ Conversely, roughly 86% of learners in quintile 5 passed matric with a bachelor pass in 2018.¹¹¹ This means that more than twice the amount of learners in quintile 5 passed matric with a bachelor pass than in quintile 1. Furthermore, the 2019 matric class achieved an 81.3% pass rate overall.¹¹² In quintile 1 roughly 49% of learners who wrote the matric examinations in 2019 received a bachelor pass.¹¹³ By contrast, roughly 86% of learners in quintile 5 received a bachelor pass.¹¹⁴ Therefore, it can be deduced from the data above that a higher level of funding in no-fee schools does not always correlate to the high throughput rate of learners. In 2016, 2017, 2018 and 2019 there was almost twice as many learners achieving a bachelor pass in quintile 5 with much less public funding than a quintile 1 school.

The figures above indicate that there are certain educational inputs play a vital role in the achievement of good throughput rates in no-fee schools. As previously mentioned, these inputs might also be influencing no-fee schools to produce high throughput rates in matric. The educational inputs that will be discussed in this thesis includes the availability of textbooks, desks and chairs, transport, proper infrastructure at no-fee schools,¹¹⁵ in particular. Arendse argues that factors such as transport costs, costs relating to school uniforms and textbooks create a barriers to education.¹¹⁶ The next section will look at these inputs and its influence on the low throughput rates in no-fee schools that hinders the full reduction in apartheid-inherited inequalities in the education system.

¹¹⁰ Department of Basic Education *Report on the 2019 National Senior Certificate Examination* (2020) 48. 41986 of 105575 of learners in quintile 1 received a bachelor's pass in 2018.

¹¹¹ Department of Basic Education *Report on the 2019 National Senior Certificate Examination* (2020) 48. 80634 of 94131 learners in quintile 5 achieved a bachelor's pass in 2018.

¹¹² Department of Basic Education *Report on the 2019 National Senior Certificate Examination* (2020) 38.

¹¹³ Department of Basic Education *Report on the 2019 National Senior Certificate Examination* (2020) 48. 50104 of 102710 of learners in quintile 1 schools achieved a bachelor's pass.

¹¹⁴ Department of Basic Education *Report on the 2019 National Senior Certificate Examination* (2020) 48. 82118 of 95736 of learners in quintile 5 achieved a bachelor's pass in 2019.

¹¹⁵ Veriava F & Skelton A "The right to basic education: A comparative study of the United States, India and Brazil" (2019) 35 *SAJHR* 1-24 at 3.

¹¹⁶ Arendse (2011) *LDD* 356. See also Skelton (2013) *De Jure* 2.

4 3 The educational inputs in education

4 3 1 *The availability of textbooks*

Textbooks are a vital instrument in guaranteeing learners a basic education. Accordingly, the lack of textbooks has been recognized as a barrier in the provision of quality basic education.¹¹⁷ The importance of textbooks in realising the right to a basic education has been illustrated by several cases. In *Minister of Basic Education v Basic Education for All* (“*BEFA*”)¹¹⁸ the Supreme Court of Appeal held that every learner is entitled to a textbook for every subject at the commencement of the academic year.¹¹⁹ Moreover, the judgment further held that it is the duty of government to provide textbooks to every learner.¹²⁰ Courts have also held that textbooks are “essential” to the right to a basic education.¹²¹ The court noted in *Tripartite Steering Committee v Minister of Basic Education* (“*Tripartite*”),¹²² that the right to a basic education “...is meaningless without... textbooks from which to learn.”¹²³

Examples of a shortage of textbooks resulting in influencing the quality of basic education a learner receives can also be found in case law. It has been noted that non-delivery of textbooks normally takes place at no-fee schools in poverty-stricken areas with limited access to resources, and where the majority of Black learners attend school.¹²⁴ In the *BEFA* case, the affected parties were from “poor communities and... overwhelmingly, if not exclusively, Black learners.”¹²⁵

In 2012, Section27 approached the court on three different occasions regarding the non-delivery of textbooks in the Limpopo province. In two of these cases, judgement was delivered.¹²⁶ The non-delivery of textbooks in the Limpopo province became known as the “Limpopo textbook saga” due the manner in which the National Department of Education mismanaged the delivery of textbooks in this province.¹²⁷ The non-delivery of textbooks took place during the staggered roll-out of the new curriculum, namely Curriculum and Assessment Policy Statement (“CAPS”) during the

¹¹⁷ Arendse (2019) *LDD* 117.

¹¹⁸ 2016 1 All SA 369 (SCA).

¹¹⁹ Para 3.

¹²⁰ Para 2.

¹²¹ *Basic Education for All v Minister of Basic Education* 2014 4 SA 274 (GP).

¹²² 2015 5 SA 107 (ECG).

¹²³ *Tripartite* para 18.

¹²⁴ *BEFA* para 10. See also Veriava *Realising the right to basic education* 117.

¹²⁵ *BEFA* para 3.

¹²⁶ *Section27 v Minister of Education* 2013 2 SA 40 (GP) and *Section27 v Minister of Education* (unreported, GNP case no 24565/2012, 23 December 2012).

¹²⁷ Veriava *Realising the right to basic education* 89.

2012 and 2014 period.¹²⁸ In 2014, Section 27 represented *BEFA* in a case that was about the incomplete delivery of textbooks.¹²⁹ Here the court confirmed the approach taken by the lower courts in the 2012 judgments, confirming that textbooks are essential to the right to a basic education. Kollapen J held that:

“textbooks are an essential component of the right to a basic education, and therefore, a prerequisite for the fulfillment of the right.”¹³⁰

Furthermore, Tuchten J stated that:

“The delivery of textbooks to certain learners, but not others, cannot constitute fulfillment of the right. Section 29(1)(a) confers the right to a basic education on everyone. If there is one learner who is not timeously provided with one’s textbooks, one’s right has been infringed. It is of no moment at this level of the enquiry that all the other learners have been given their books.”¹³¹

The quotations above make it clear that textbooks are vital for the full realisation of the right to a basic education but also the realisation of a quality education for learners. Moreover, an incomplete delivery or non-delivery of textbooks violates the right to a basic education as textbooks are intrinsically linked to providing learners with education.¹³²

4.3.2 School furniture

The High Court has identified other entitlements that also relate to the right to a basic education.¹³³ This includes school furniture. *Madzodzo v Minister of Basic Education* (“*Madzodzo*”),¹³⁴ dealt with the failure of government to deliver desks and chairs to schools located in the Eastern Cape. The government made the argument that it need not deliver school furniture within a specific time frame but that all it was required to do was show progress in delivering the furniture, and that it has a reasonable plan for such delivery. The court rejected this argument by relying on the *Juma Musjid* judgment reaffirming that the right to a basic education is an empowerment right.¹³⁵ Goosen J found that government was required “to take all reasonable measures to realise the right to a basic education with immediate effect. This requires that all necessary conditions for the right to education must be provided.”¹³⁶ Subsequently,

¹²⁸ 89.

¹²⁹ *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA) para 17.

¹³⁰ *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP) para 25.

¹³¹ *Basic Education for All v Minister of Basic Education* 2014 4 SA 274 (GP) para 52.

¹³² *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP) para 25.

¹³³ Arendse (2019) *LDD* 113.

¹³⁴ 2014 3 SA 441 (ECM).

¹³⁵ *Juma Musjid* para 18.

¹³⁶ Para 17.

Goosen J confirmed that school furniture such as desks and chairs are a component of the right to a basic education:

“The State’s obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of education resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right to basic education.”¹³⁷

Therefore, it is important to note that school furniture is also an essential component of the right to a basic education, and essential to provide learners with a quality education, especially in no-fee schools.

4 3 3 Transport costs

Scholar transport can also be seen as an essential input that is necessary for the realisation of quality education.¹³⁸ In *Tripartite* the court was required to “determine whether the right to a basic education includes a direct entitlement to be provided with transport to and from school at the government’s expense.”¹³⁹ This expense will cover the travel expense incurred by learners who travel to and from school and who are unable to afford the cost of transport.¹⁴⁰ The court concluded that it did. Plaskett J stated that:

“The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn and transport to and from school at State expense in appropriate cases. Put differently, in instances where scholars’ access to schools is hindered by distance and an ability to afford the cost of transport, Government is obliged to provide transport to them in order to meet its obligation, in terms of section 7(2) of the Constitution, to promote and fulfil the right to a basic education.”¹⁴¹

Therefore, in this case the government was directed to provide transport to learners of certain schools and to revisit its decision to refuse scholar transport to other schools.¹⁴²

¹³⁷ *Madzodzo* para 35.

¹³⁸ Joseph S & Carpenter J “School transport” in Veriava F, Thom A & Hodgson TF (eds) *Basic Education Rights Handbook* (2017) 274-291 at 276. See also Arendse (2019) *LDD* 113.

¹³⁹ *Veriava Realising the right to basic education* 93.

¹⁴⁰ 93.

¹⁴¹ *Tripartite* paras 18 & 19.

¹⁴² *Veriava Realising the right to basic education* 94.

4.3.4 School infrastructure

Singh notes that “adequate school infrastructure, facilities and the school environment” are indicators of quality education.¹⁴³ The inadequate state of infrastructure in previously disadvantaged schools was lamented by the Constitutional Court in *Juma Musjid*:

“The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.”¹⁴⁴

In light of the above, proper infrastructure at schools may also be viewed as an essential component of the right to a basic education.¹⁴⁵ In *Equal Education v Minister of Basic Education* (“*Equal Education*”),¹⁴⁶ *Equal Education* argued that infrastructure is a “necessary precondition”¹⁴⁷ for the right to a basic education. *Equal Education* notes the government’s own admissions as to the causal link between poor infrastructure and poor educational outcomes.¹⁴⁸ Moreover, the court in this case stressed the importance of infrastructure for the realisation of basic education.¹⁴⁹ In *Centre for Child Law v Government of the Eastern Cape Province*,¹⁵⁰ seven schools in the Eastern Cape requested government to upgrade their schools. Some of these schools have been struggling with missing roofs, and no running water or sanitation. This made it impossible for learners to attend schools, especially on rainy days as learners could not sit inside the classroom.¹⁵¹ Furthermore, this led to high rates of absenteeism caused by sickness due to the poor conditions at these schools.¹⁵² Subsequently, government pledged R8.2 billion over a period of three years to upgrade these schools.

¹⁴³ Singh K *Report of the Special Rapporteur on the right to education: Normative action for quality education* (2012) 7. See also Arendse (2019) LDD 112.

¹⁴⁴ *Juma Musjid* para 42.

¹⁴⁵ McConnachie and McConnachie (2012) SALJ 554,560. See also Veriava *Realising the right to basic education* 96; *Equal Education v Minister of Basic Education* 2018 3 All SA 705 (ECB) para 182; Veriava & Skelton (2019) SAJHR 4.

¹⁴⁶ 2018 3 All SA 705 (ECB).

¹⁴⁷ *Equal Education*’s founding affidavit in the *Equal Education* case para 34.

¹⁴⁸ *Equal Education*’s founding affidavit paras 48-49. See also *Equal Education*’s heads of argument paras 26-29.

¹⁴⁹ *Equal Education* para 170.

¹⁵⁰ Unreported, ECB case no 504/10, 2011.

¹⁵¹ Veriava *Realising the right to basic education* 96 n 45.

¹⁵² 96 n 45.

The *Komape v Minister of Basic Education* (“*Komape*”),¹⁵³ case dealt with safe and decent sanitation at schools. In 2014, Komape fell into a full and dilapidated pit toilet at school and drowned.¹⁵⁴ The family of Komape, represented by Section27, instituted a claim for wrongful and negligent death. The court found that the Limpopo Department of Education had displayed a “complete lack of urgency and commitment”¹⁵⁵ in using and allocating funds specifically to provide safe and decent sanitation at schools. In doing so, the court found that the government has failed to perform its obligations towards the learners in the Limpopo province, resulting in Komape’s death.¹⁵⁶ In turn, the court held that the government violated a number of rights of the learners in this province, including the right to a basic education.¹⁵⁷ The court issued a “structural order requiring that government provide to the court, by a specified date, an audit of the number of pit toilets in the province, together with a detailed plan for the provision of safe and hygienic toilets.”¹⁵⁸

Although progress has been made in addressing infrastructural problems by the State,¹⁵⁹ there are still numerous schools left without adequate facilities. The latest National Education Infrastructure Management System Report (“NEIMS report”),¹⁶⁰ states that more than 80% of ordinary operational schools lack laboratories, and more than 70% of schools lack libraries.¹⁶¹ Moreover, the Eastern Cape still has the majority of mud schools in South Africa.¹⁶² Thus, there is still a lot of work to be done with regard to school infrastructure in certain schools in order to provide all learners with quality education. However, as argued above,¹⁶³ and illustrated above, more State funding for infrastructure is directed to poor schools. This means that State funding for infrastructure is also geared towards reducing apartheid-inherited inequalities in the education system of South Africa.

¹⁵³ (1416/2015) [2018] ZALMPPHC 18 (23 April 2018).

¹⁵⁴ *Komape* para 2.

¹⁵⁵ Para 25.

¹⁵⁶ Para 55.

¹⁵⁷ Para 74.

¹⁵⁸ *Komape* para 64. See also Veriava *Realising the right to basic education* 100.

¹⁵⁹ Department of Basic Education *Annual Report* (2016/2017) 11.

¹⁶⁰ Department of Basic Education *National Education Infrastructure Management System Report* (2018).

¹⁶¹ Table 8 of the NEIMS report.

¹⁶² Arendse (2019) *LDD* 113.

¹⁶³ See section 3, n 55, and section 6 in Chapter 4.

4 3 5 Concluding remarks

The courts have held that certain inputs are essential to the full realisation of the right to a basic education. These inputs were briefly described above and includes textbooks, school furniture, proper school infrastructure and transport costs. Given the discussion above, it is important to point out that these inputs do not take away from the fact that the State has ensured that all learners have economic access to public schooling through the implementation of the quintile funding system, and the fee-exemption policy at fee-charging schools. However, these inputs are important for viewing the right to a basic education holistically. Although the quintile funding system has made strides to provide learners with economic access to a basic education, and thereby reducing funding inequalities in the education system, the presence of these inputs at schools speaks to the fact that the quintile funding system cannot eradicate past inequalities alone. These inputs play a vital role in the inability of learners at no-fee schools to move upward in society as the quality of education received is influenced by these educational inputs listed above.

5 Conclusion

This chapter aimed to analyse whether the State is in compliance with its constitutional and international obligations to provide access to basic education for all learners from grade R to grade 12. In essence, it has been submitted that the State is fulfilling its constitutional duties through the implementation of the quintile funding system in order to provide economic access to basic education to all learners, especially poor learners. In doing so, the quintile funding system is also in line with its contextual interpretation of the right to a basic education as marginalised and previously disadvantaged learners are catered for first as more funding is directed towards quintile 1 to 3 schools. This allows for the indirect cross-subsidisation of poor schools by wealthy schools. Moreover, the quintile funding system is also seemingly in line with the transformative role of the Constitution as the quintile funding system is enabling all learners to access schooling, and in doing so redressing the disparities of the past. It has also been submitted that the charging of school fees does not create any barriers to entry as the quintile funding system opened up the possibility for all learners to attend schools by the establishment of no-fee schools. Moreover, it has also been submitted that no-fee schools are partially in line with the international call for States to provide free basic education.

It was also important to point out that a higher level of funding in no-fee schools does not always correlate to a high throughput rate in no-fee schools. It has also been illustrated above that the educational inputs in education influences the quality of education received by learners, especially those learners attending school in poorer areas. Accordingly, it was submitted that the quintile funding system cannot on its own resolve the apartheid-inherited inequalities in the basic education system. There are education inputs that play a vital role in the low through put rates in no-fee schools, as compared to quintile 5 schools. Therefore, even though the State is in compliance with its constitutional and international obligations regarding providing all learners with economic access, matric pass rates that enable social mobility is still vastly unequal as illustrated above.

Chapter 6: Conclusion

1 Introduction

Education plays a great role in building an inclusive society by providing equal educational opportunities. This thesis explored whether the implementation of the quintile funding system by the State has reduced apartheid-inherited inequalities in the basic education system of South Africa. It has done so by exploring the education system during the apartheid era, exploring the interpretation of the right to a basic education as entrenched by section 29(1)(a) of the Constitution, exploring the quintile funding system and lastly, analysing whether the quintile funding system is in fact reducing apartheid-inherited inequalities. In this regard, consideration was also given to some educational inputs that has an influence on the quality of education received in no-fee schools that ultimately hinder the full fulfilment of the right to a basic education. This section offers a summary of the most important findings in each chapter that ultimately contributes to this study's conclusion.

2 Summary of chapters

2.1 Education in the apartheid era

This study began with exploring the inequalities in the education system during the apartheid era. Education as a socio-economic benefit was regulated via legislation on a racially discriminatory basis. It is evident that schools were a vital tool in the apartheid scheme to ensure that learners of all races were separated. This was in line with the apartheid government's ideology that all races must develop separately.

As illustrated by the figures in chapter 2,¹ White schools were treated more favourably by the apartheid government. Black learners received far less funding from the apartheid government than White learners. For example, at the peak of apartheid, spending on a White learner was ten times more than on a Black learner.² Black schools were often abandoned by the apartheid government and had to fund itself during certain periods during apartheid.³ Some Black learners did not attend school, and some Black learners attended school but received an education that was so basic

¹ See section 4.2 in Chapter 2.

² Simbo (2012) *LDD* 168. See section 4.2 in Chapter 2.

³ See section 4.2 in Chapter 2.

that there was no actual purpose for attending school. Furthermore, some Black learners were withheld from receiving education entirely. This disrupted their access to the Black schools entirely. In effect, this led to poor education and higher dropout rates in Black schools.⁴ Conversely, White schools were able to invest in enough resources to advantage a White learner in order to produce good academic performances,⁵ and seek further education. Evidently, these discrepancies in the funding of these schools created a two-school system differentiating between Black and White learners. It is evident that there are huge differences in the educational achievements by Black and White learners.⁶ The lack of funding in Black schools made it difficult or nearly impossible for Black learners to pursue further education.⁷ The apartheid government ensured that Black learners could not move out of their circumstances and move up the social hierarchy. This led to various outbursts of protests across the country, for example, the Soweto-uprising in an effort to seek equal education.

Eventually, formal apartheid came to an end and the newly elected democratic government came to power in 1994. The new government wanted to create a more equal society for all its people. Moreover, the government also had a huge task ahead to reform the grossly unequal education system, and the unequal funding thereof. Educational reform is a vital part of constitutional transformation as transforming the school system to be democratic and non-discriminatory is essential for the inclusion of all learners.⁸

2.2 The right to a basic education

Chapter 3 aimed to explain and interpret the right to a basic education as guaranteed by section 29(1)(a) of the Constitution. Firstly, this chapter focussed on the inclusion of education as a socio-economic right in the 1996 Constitution. Many argued for its inclusion as education is seen as a vital instrument in transforming society. This is also in line with the transformative role of the Constitution. The right to a basic education is viewed as the “primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully

⁴ Mncwabe *Post-apartheid education* 27. See also Khumalo *Some implications* 37.

⁵ Robertson & Robertson *Education in South Africa* 19-23. See also Simbo (2012) *LDD* 168.

⁶ Khumalo *Some implications* 37. See section 4.4 of Chapter 2.

⁷ Simbo (2012) *LDD* 169.

⁸ Pieterse (2004) *TSAR* 709. See also Bray *Human rights in education* 79.

in their communities.”⁹ In light of the vital importance and transformative role of education in society, some priority is added to the right to a basic education.

The right to a basic education has been described as a stronger right when compared to other socio-economic rights guaranteed in the Constitution.¹⁰ *Juma Musjid* affirms that the right to a basic education is essentially distinct from other socio-economic rights in the Constitution.¹¹ The constitutional text of section 29(1)(a) of the Constitution indicates that the right to basic education is not dependant on the availability of resources, is not subject to a reasonableness standard, and the source of an immediate, direct and specific entitlement.¹²

Given the historical account of the basic education system in South Africa, it is important to consider the interpretations of the right to a basic education. Subsequently, this chapter then considered the interpretation and definition of the right to a basic education in the constitutional text, as informed by interpretive international tools, and the international law context. This section made an important distinction between the formal understanding of basic education and the substantive meaning of basic education. This section found that the formal understanding of the right to a basic education refers to the GET and FET phases of schooling, that is, grade R to grade 12. The formal understanding of the right to a basic education is the foundation of this study as the State has a continued obligation to provide learners with economic access to a basic education from grade R to grade 12.

Lastly, this chapter discussed the constitutional and international law obligations imposed on the State to provide all learners with economic access to basic education. This study found that section 29(1)(a) of the Constitution obligates the State to make education available and accessible to all learners. Furthermore, section 7(2) of the Constitution obligates the State to “respect, protect, promote and fulfil” the right to a basic education. In light of this study, there were two important aspects established here. Firstly, that no one may interfere with the access or enjoyment of a learner’s right to a basic education. Secondly, that the State must ensure that all learners have the ability to gain access to basic education. The study then explored the international

⁹ Paterson (2018) *SAJHR* 115.

¹⁰ Seleane 2003) *LDD* 140. See also Skelton (2012) *SAPL* 395.

¹¹ *Juma Musjid* para 37. See also *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA); *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM); *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG).

¹² Fleisch & Woolman *Constitution in the Classroom* 121.

obligations imposed on the State. It established that the State has general international obligations to respect, protect and fulfil the right to a basic education.¹³ This study then considered the 4-A scheme that obliges the State to make education available, acceptable, adaptable and accessible for all learners. This section particularly focussed on the accessibility aspect raised in international law discourse. More particularly, for purposes of this study, this section focussed on the economic accessibility of public school for all learners. It is important to note that the realisation of access to basic education is not possible without proper funding from the State. In doing so, the State has implemented a pro-poor funding model, the quintile funding system, to address the inequalities in the funding of basic education from grade R to 12.

2.3 The quintile funding system

Chapter 4 introduced the quintile funding system, the aims of the quintile funding system, the functioning thereof, and how funds are distributed to the different quintiles. The funding of schools by the State plays a vital role in an attempt to redress the imbalances caused by the calculated discriminatory policies of the apartheid government. The government introduced the NNSF policy to assist its transformation agenda in education to eliminate disparities in public schools. The NNSF policy regulates the funding of public schools. The quintile funding system is of key importance here.

The quintile funding system was introduced as part of the NNSF policy in order to improve equity in the funding of the education system. The quintile funding system introduced no-fee schools (quintile 1, 2 and 3 schools) and fee-charging schools (quintile 4 and 5 schools). The government had to recognise that in order to benefit the majority of poor learners, it had to develop a funding mechanism that would provide for the cross-subsidisation of school fees.¹⁴ This means that less money is paid to a school that is in an affluent position to raise money itself through school fees or any other funding mechanism and more money is paid to schools in poorer areas.¹⁵ The NNSF policy regulates the NPNC expenditure as this expenditure has been described as a vital tool to support the State's commitment in fulfilling its constitutional

¹³ CESCR *General Comment No 13* (1999) para 46. See also Arendse (2011) *PELJ* 103.

¹⁴ Dass & Rinquest "School Fees" in *Basic Education Rights Handbook* (2017) 144.

¹⁵ 144.

obligation to provide education to all learners.¹⁶ Consequently, the NNSSF policy provides greater levels of non-personnel funding to no-fee public schools serving poor communities as the quintile funding system aims to redress past funding inequalities. Moreover, this chapter also submitted that State funding for infrastructure is also geared towards reducing apartheid-inherited inequalities as more funding for infrastructure is directed towards poor schools. This chapter also explored the fee-exemption policy as certain schools are permitted to charge school fees. School fee exemptions assist poor learners to access basic education in fee-charging schools.¹⁷ With the introduction of no-fee schools and the fee-exemption policy in fee-charging schools, no learner can be denied admission, or otherwise be discriminated against, on grounds of the parents' or guardians' inability to pay school fees.¹⁸ In theory, both these options ensures that access to the right to a basic education is realised. One of the aims of this study is to determine if this is indeed so on a constitutional and international law level, and in doing so reducing apartheid-inherited inequalities. The following chapter provided an analysis of these obligations as the quintile funding system has a direct influence on the funding of public schools.

2 4 Analysis of the quintile funding system reducing apartheid-inherited inequalities

This study aimed to examine whether the State is reducing apartheid-inherited inequalities in the basic education system of South Africa through the implementation of the quintile funding system. In chapter 5, this was done by analysing whether the State is complying with its constitutional and international obligations to provide all learners with economic access in terms of the formal understanding of a basic education through the implementation of the quintile funding system. It was established that the State is in compliance with its constitutional obligations in terms of sections 7(2) and 29(1)(a) of the Constitution, and the contextual interpretation of the right to a basic education. The quintile funding system has made it possible for the State to provide economic access to basic education to poor learners first, before privileged learners are catered for. Similarly, with reference to international law, the State is in partial compliance with the call for free basic education. Woolman and Bishop submit that the provision of basic education does not have to be immediately

¹⁶ *Amended NNSSF* para 88. See further Veriava *Realising the right to basic education* 39.

¹⁷ Mestry (2013) *De Jure* 173. See also Veriava "Free to learn" in *Towards a means to live* 1.

¹⁸ Bisschoff & Mestry *Financial school management* 56.

free for all. In this light, the quintile funding system has made strides as only quintile 1,2 and 3 schools are free. Thus, it is evident that the implementation of the no-fee policy in quintile 1–3 schools, the State is gradually making basic education free for all learners. However, as this chapter pointed out, the right to a basic education must be viewed holistically. As illustrated in this chapter, a higher level of funding does not always correlate to a higher throughput rate. It is evident by the figures provided that there is a lower throughput rate in no-fee schools than fee-charging schools. This speaks to certain educational inputs that influences the quality of basic education received in no-fee schools. Although the quintile funding system is providing learners with economic access to basic education, and reducing funding inequalities, these inputs hinders the full realisation of the right to a basic education and creates inequality. Therefore, it is evident that the quintile funding system cannot reduce the apartheid-inherited inequalities in the education system alone.

3 Final remarks

Many conclusions about the implications of the NNSF policy and the quintile funding system can be drawn. Both aims to redress the past inequalities in the education system and the funding thereof during the apartheid era. The State has made strides with transforming the education system to make it economically inclusive for all learners, especially those learners who have been left marginalised by the legacy of apartheid. The State implemented the quintile funding system to direct more funding towards poorer schools in poor areas. In doing so, the State has made it possible for a learner from an impoverished area to attend a no-fee school or a fee-charging school with the possibility of applying for a fee-exemption. This means that no learner is left behind due to the inability to afford school fees, and it alleviates the financial burden off parents and guardians. In doing so, the State has complied with its obligations to provide economic access to basic education for all learners. It is important to remember that the one of the aims of the study was to determine whether the quintile funding system assists all learners with economic access to basic education. The outcome of this study was based on the economic access argument, and not the quality of basic education received in certain schools. The quality of basic education does not have anything to do with a learner's economic access to a public school and to receive a basic education. However, this does not take away from the fact that the State has made it possible for all learners to access and attend public schools.

The main research question that this study posed was whether the implementation of the quintile funding system by the State is reducing apartheid-inherited inequalities in the basic education system of South Africa. In this regard, this study found that the implementation of the quintile funding system is reducing apartheid-inherited inequalities in terms of the funding of basic education, and thereby creating economic access to public schools for everyone. However, even though the quintile funding system is reducing the funding inequalities in the basic education system, there are still low throughput rates in no-fee schools, which in turn has a significant influence on social mobility.¹⁹ Therefore, even though all learners have economic access to basic education, there are still certain educational inputs that has a significant influence on the quality of education received in no-fee schools. These inputs place a barrier on the full fulfillment of the right to a basic education. Therefore, the quintile funding system cannot work alone in reducing all the apartheid-inherited inequalities in the education system of South Africa. It is of vital importance that the South African government works towards addressing these educational inputs as it hinders the full realisation of the right to a basic education, especially in poor schools.

¹⁹ See section 4.2 in Chapter 5.

Abbreviations

AHRLJ – African Human Rights Law Journal

CLoSA – Constitutional Law of South Africa

Col LR – Columbia Law Review

De Jure – De Jure Law Journal

ESR Review – Economic and Social Rights Review

LDD – Law, Democracy and Development

PELJ – Potchefstroom Electronic Law Journal

SAJE – South African Journal of Education

SAJHR – South African Journal on Human Rights

SALJ – South African Law Journal

SAPL – South African Public Law

SARE – South African Review of Education

TSAR – Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law

Yale LJ – Yale Law Journal

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